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MARY J. DAVIS*

Toward the Proper Role for Mass Tort Class Actions

It is currently unfashionable to defend the class action for resolving mass tort litigation.¹ Recent heated debate over two enormous asbestos settlement class actions² and the Supreme Court's recent decision in one of those actions, *Amchem Products Inc. v. Windsor*,³ exploring the appropriateness of the settlement class, have placed the continuing validity of the mass tort class action in serious doubt. Many academics,⁴ as well as federal

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¹ For purposes of this Article, mass tort litigation refers to those circumstances where a product, not an accident, has caused geographically and temporally widespread harm to consumers of the product, and possibly bystanders as well. In such cases, there is very likely more than one potentially responsible party if only because more than one product manufacturer typically will exist. The paradigm mass tort is, of course, asbestos personal injury, but most mass torts do not have such a long life nor such a large number of putatively responsible parties. The Dalkon Shield intrauterine device is another prime example. Thousands of women were injured from use of the Dalkon Shield which was manufactured by only one company, A.H. Robins. For a thorough discussion of the nature of mass tort litigation, see Deborah R. Hensler and Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993).

² *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997) (affirming reversal of certification to settlement class of millions of future injury asbestos claimants against consortium of 20 former asbestos manufacturers); *In re Asbestos Litigation*, 101 F.3d 368 (5th Cir. 1996), *vacated sub nom. Flanagan v. Ahearn*, 117 S. Ct. 2503, *aff'd on remand*, 134 F.3d 668 (5th Cir. 1998) (settlement class of thousands of asbestos present and future injury claimants certified against one defendant, Fibreboard Corp.).

³ 117 S. Ct. 2231 (1997) (settlement nature of class action relevant in certification decision under FED. R. CIV. P. 23(b)(3)).

⁴ See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (criticizing mass tort settlement classes and suggesting bankruptcy is a better solution to large numbers of mass tort claimants);

court of appeals judges,⁵ have also pronounced the death knell for the mass tort class action.⁶

This Article seeks to advance the use of mass tort class actions and proposes that they are not only appropriate, but desirable, when evaluated against the backdrop of substantive tort law policies. Moreover, the substantive goals of tort law as applied in the mass tort context support the conclusion that the individualized case-by-case adjudication standard, as applied through our adversary system as it is presently constituted, fails to further the search for fairness as well as truth in the mass tort context, and therefore, does not achieve the fairness or justice that we seek through our judicial process.⁷

Tort law serves as a method for society to impose responsibility upon those who have created certain socially undesirable harms as defined by considering a complex combination of underlying

Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295 (1996) (recommending administrative solution to mass tort claims). See generally Symposium, *The Institute of Judicial Administration Research Conference on Class Actions*, 71 N.Y.U. L. REV. 1 (1996); Symposium, *Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995). For a defense lawyer's perspective, see Eric Watt Wiechmann et al., *Mass Tort Class Actions: Is the Tide Turning?*, 64 DEF. COUNSEL J. 67 (1997); and for the plaintiff's viewpoint, see Ronald L. Motley and Susan Nial, *A Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?*, 13 CARDOZO L. REV. 1919 (1992).

⁵ For a detailed discussion of the important recent appellate opinions decertifying class actions, see *infra* notes 153-232 and accompanying text. The most stunning example of a federal appellate judge's disbelief in the usefulness of a mass tort class action is found in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, J.), discussed *infra* notes 160-82 and accompanying text.

⁶ Defenders of class actions are likely to be described as enemies of the integrity of the judicial system, as well as either prejudicially plaintiff or defense oriented, depending on the critic's particular point of view. An example of the contentiousness of the debate about mass tort class actions can be found in *Georgine v. Amchem Products, Inc.*, 83 F.3d at 618.

⁷ For a discussion of the view that the adversary system may no longer be the best method for resolving disputes in our society, see Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996). Professor Menkel-Meadow, and others, continue to suggest that because of the illusive nature of truth, and the complex nature of our society as well as the disputes it gives rise to, the adversary system "is inadequate, indeed dangerous, for satisfying a number of important goals of any legal or dispute resolution system Binary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies." *Id.* at 6 (footnotes omitted). Professor Menkel-Meadow uses mass tort class actions as an example of the complexity of modern life's problems with which the adversary system may be inadequate to deal. *Id.* at 10. See also JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949).

goals. Most observers of the tort system generally regard the underlying principle bases of tort responsibility rules to be the dual notions of fairness and efficiency.⁸ Just as tort rules of responsibility consider these two primary, but not exclusive, viewpoints, the process by which liability is determined should permit a balanced presentation of the viewpoints which inform that liability determination, including an accurate reflection of the magnitude of the harm and the extent of the potential liability. By prohibiting the use of the class action to resolve multi-faceted, complex mass tort litigation, and thereby requiring individualized resolution of such claims, the recent decisions denying mass tort class action treatment fail to promote the full array of underlying goals of tort law. Further, those decisions contribute to the perception of a judicial system that is unresponsive to basic societal goals, a system that is thereby irretrievably prejudiced in favor of an irresponsible institutional defendant over the victim of irresponsibility. If viewed through the backdrop of tort responsibility theories, the mass tort class action is, in fact, a balanced approach to determining responsibility for such widely caused harm.

The guiding principle of this Article's thesis is that the judiciary, as well as other opponents of the mass tort class action, has an unnecessarily "proceduralist" perspective on the class action tool, with an inordinate fear of the "mass" side of the equation. That fear stems from the proceduralist's concern with the traditional right to individualized, case-by-case adjudication and the judicial system's perceived need to maintain and insure its integrity only through that traditional adversary system.⁹ This Article

⁸ For a thorough description of the goals of products liability in particular see Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217 (1993). See also David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427 (1993); see generally George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (proposing theory of liability based on reciprocity of risk); Symposium, *Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 IOWA L. REV. 403 (1992) (exploring corrective justice theory as applied to tort goals); ROBERT L. RABIN, *PERSPECTIVES ON TORT LAW* (4th ed. 1995) (compilation of articles on foundation of tort law).

⁹ For a thorough discussion of the proceduralist's viewpoint regarding class actions and other complex litigation generally, see Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (Summer 1991) (discussing the move toward collective treatment of cases, and away from the individual case-by-case adjudication model on which our judicial system is founded). For a more general view of the class action in relation to the individual versus collective adjudication model, see Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 25 (1996) (defining the central normative tension in the class action as

proposes that the proper definition of the mass tort class action requires a greater focus on the "tort" side of the "mass tort" equation.¹⁰ The proceduralist view is concerned with the generic effect of a particular procedure on the fairness and efficiency of the judicial system, not with its effect on the underlying substantive rule in issue.¹¹ Torts theorists, on the other hand, focus on the effect of application of the rule in issue on behavioral, cultural, political, societal, and other goals on which the rule is founded.¹² At bottom, the procedure enables the substance; it gives purpose and promise to the goals the substance seeks to accomplish. To enable the goals of the tort responsibility rules to operate in the context of the mass produced harms of the Twentieth and Twenty-First Centuries, the class action, or some reform of the adversary system as it is currently constituted,¹³ must be available.

A number of preliminary conclusions stem from this tort perspective and will provide a framework for the remainder of this Article. First, from a torts perspective, certification of a mass tort class action should not be an all or nothing proposition. Recent mass tort class action decertification opinions speak categor-

stemming from the principle that each person should have a day in court). *See generally* Symposium, *National Mass Tort Conference*, 73 TEX. L. REV. 1523 (1995) (discussing proposals to aggregate mass tort claims and to amend the multidistrict litigation statute to permit discovery coordination of large-scale litigation without compromising individual litigants' rights); William W. Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529, 1529-31 (1995) (different categories of litigation create different kinds of problems but aggregation can compromise litigants' rights to individualized resolution of claims).

¹⁰ Only a very few articles have discussed the class action method from a "substance" point of view. *See, e.g.*, Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995) (discussing a perceived tort reform effect of class actions); David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996) (discussing aggregation methods as means of promoting substantive tort law goals of deterrence and compensation).

¹¹ *See* FED. R. CIV. P. 1 (rules designed to achieve just, speedy, and inexpensive determinations). On the transsubstantive nature of the Federal Rules, see Weber, *The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases*, 14 REV. LITIG. 113, 120 (1994).

¹² For a discussion of torts scholarship and its relevance to how the world works, see Marshall S. Shapo, *In the Looking Glass: What Torts Scholarship Can Teach Us About the American Experience*, 89 NW. U. L. REV. 1567 (1995).

¹³ *See, e.g.*, Menkel-Meadow, *supra* note 7, at 31.

ically on this point, suggesting that the mass tort class action is virtually an impossibility.¹⁴ Second, the class action device must be viewed contextually to determine its proper scope in the mass tort context. In other words, the context of the particular type of mass tort litigation involved must be given central focus to determine whether the class action can be usefully employed—useful to effectuate the goals of both the judicial system and the organic tort laws which that system exists to enforce. Rule 23 of the Federal Rules of Civil Procedure, which governs federal class actions,¹⁵ is indeed written with the underlying case context in mind, but it has not been so applied. Third, and most importantly, the individualized adjudication model, so well-suited to the pre-technology age, must be allowed to leave center stage in the post-technology age, and acceptance of alternative remedies like the class action must be allowed to take it. In our post-technology society, with the total absence of a one-to-one, individualized connection between the consumer and the institutional product liability defendant,¹⁶ it is unrealistic to expect that the determination of responsibility for mass product-related harm will be left in perpetuity to that pre-1940's individualized litigation model.¹⁷

Several sweeping recent United States court of appeals decisions, and volumes of academic scholarship, make it necessary to emphasize not only the appropriateness, but the attractiveness of the class action alternative for mass torts. In those decisions, among them the asbestos settlement class cases of *In re Asbestos Litigation*,¹⁸ *Georgine v. Amchem Products, Inc.*,¹⁹ the HIV-in-

¹⁴ For a discussion of these federal appellate cases, see *infra* notes 153-232 and accompanying text.

¹⁵ See FED. R. CIV. P. 23. The details of Federal Rule 23's requirements, which are widely followed in state court practice as well, are left to Part III of this Article. For the view that state court is the better forum for resolving mass tort litigation, see Marc C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215 (1994).

¹⁶ Because there are a variety of product liability defendants, I use the term "institutional defendant" to incorporate all such entities. The vast majority of products liability defendants are manufacturers, and so, too, the class action defendant. But it is possible that other categories of defendants will be involved, such as distributors, marketers, and retailers.

¹⁷ For a brief explanation of the connection between use of the class action and the political ideology of the 1960s, see Fiss, *supra* note 9, at 30-31.

¹⁸ 101 F.3d 368 (5th Cir. 1996), *vacated sub nom.* *Flanagan v. Ahearn*, 117 S. Ct. 2503 (1997), *aff'd on remand*, 134 F.3d 668 (5th Cir. 1998). The court of appeals upheld certification of a class action in the settlement of thousands of asbestos

fects blood litigation in *In re Rhone-Poulenc Rorer, Inc.*,²⁰ and the nationwide tobacco class action in *Castano v. American Tobacco Co.*,²¹ the class action method of resolving mass tort claims was rejected as a means of dealing with the onslaught of mass tort litigation.²² Given the experience of our mass production, post-technology society, mass tort litigation is to be anticipated for years to come. While many reasons may exist to reject the class action for certain categories of mass torts,²³ the two primary reasons relied upon in these cases—the judicial system's

claims against Fibreboard Corp., one of the few remaining solvent major players in the asbestos litigation saga.

¹⁹ *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997) (decertifying a settlement class of 250,000 to 2,000,000 asbestos future injury plaintiffs against a group of 20 defendants). *Georgine* and *In re Asbestos Litigation* serve as bookends in the settlement class debate since the Third Circuit rejected such a class and the Fifth Circuit upheld it. The Supreme Court's definitive treatment of the availability of settlement classes, while not central to this article, will be discussed *infra* notes 143-152 and accompanying text.

In addition, for a number of reasons to be explained *infra* relating to the contextual nature of mass tort class actions, asbestos litigation must be treated separately from other mass tort class actions in evaluating the propriety of that aggregation method of resolving such claims. The asbestos litigation carries so much baggage that it is impossible for the players to be objective in any meaningful sense in resolving that litigation, through settlement or otherwise, and the class action may indeed be inappropriate for its resolution. See, e.g., Coffee, *supra* note 4. Consequently, battles fought and lessons learned from the asbestos litigation may well prove too much in other contexts.

²⁰ 51 F.3d 1293 (7th Cir. 1995).

²¹ 84 F.3d 734 (5th Cir. 1996). Because the activity in the tobacco litigation seems to take place at such a fevered pace, at least since *Castano* was decertified and dozens of state-wide class actions have taken its place, a full explanation of the current events in that litigation will not be attempted. Suffice it to say that a settlement has been negotiated between the states suing for Medicaid expense reimbursements and both the states of Mississippi and Florida have settled their actions for approximately \$3 and \$11 billion respectively. The settlement, which may become federal legislation, will be discussed in Congress throughout the coming year; the tobacco companies primarily seek immunity from class actions and punitive damages. For a discussion of the legal issues in the tobacco controversy, see Symposium, *Tobacco: The Growing Controversy*, 24 N. KY. L. REV. 397 (1997) (articles by Ausness, LeBel, Wertheimer, and others).

²² Also important in this area are *In re American Medical Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (decertifying a class of approximately 10,000 to 20,000 penile prosthesis plaintiffs), and *In re General Motors Corp. Pick-up Truck Fuel Tank*, 55 F.3d 768 (3d Cir.), *cert. denied sub nom.* *General Motors Corp. v. French*, 116 S.Ct. 88 (1995) (decertifying a settlement class of over 500,000 GM truck owners, none involving personal injury).

²³ For a discussion of the criticisms of mass tort class action certification, see *infra* Part IV. See generally Coffee, *supra* note 4, at 1363-67.

inability to handle such actions with integrity,²⁴ and the financial welfare of the institutional defendant tortfeasors²⁵—provide a wholly insufficient basis to do so, particularly in light of the underlying tort goals.²⁶ In spite of the documented tragedy of mass-produced harms, the traditional one-on-one individualized adjudication model, which generally insulates the institutional defendants from shouldering the full extent of their responsibility, remains embedded in the psyche of this country's legal academy.²⁷

This Article proposes that there exists a category of mass torts for which class action treatment is both appropriate and imperative: those involving widespread personal injury, currently manifested or reasonably certain to occur, caused by a discrete, though not necessarily a small, number of potentially culpable defendants whose allegedly tortious behavior was/is widely directed to the consuming public. An important component of this definition, a relatively discrete group of defendants, leads to the conclusion that asbestos litigation, the single most complex mass tort litigation to date, must be singled out for resolution, and likely is, in most respects, inappropriate for class action treatment. The contentious debate between proponents and opponents of the recent asbestos settlement classes in *Amchem Products Inc. v. Windsor* and in *In re Asbestos Litigation*, provides significant support for the idea that asbestos litigation is in need of a true alternative resolution process.²⁸

²⁴ See *Georgine*, 83 F.3d at 618.

²⁵ See *Rhone-Poulenc Rorer*, 51 F.3d at 1300.

²⁶ On the inability of the judicial system to handle advances in technology which lead to mass consumer harms with which this article is concerned, see Nagareda, *supra* note 4, at 296-300 (mass torts illustrate effort to handle unanticipated consequences of modern technology, suggesting administrative procedures to resolve such claims); John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1012 (1995) (our ability to harness technology tests capacity of the legal system); and Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 907 (1987) (reaping benefits of technology creates mass torts which require redress by system ill-equipped to handle it).

²⁷ On the topic generally of a culture of irresponsibility that has been promoted over the last decades in favor of irresponsible defendants, see Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1075 (1996).

²⁸ Chief Justice Rehnquist created the Judicial Conference's Ad Hoc Committee on Asbestos Litigation in 1990 to explore this very issue. That Committee's report in 1991 proposed a national asbestos dispute resolution scheme based on consolidation in a single forum. See Ad Hoc Committee on Asbestos Litigation, *in* Reports of the

Separating asbestos litigation from the rest of the mass tort world, however, does not require the further conclusion that class actions are inappropriate for other mass torts. The criticism of mass tort class actions based on their inappropriateness for resolving asbestos litigation proves too much. Asbestos litigation should be seen as only a subclass of mass tort litigation and not given any greater weight in the class action analysis than is due. Indeed, this Article's thesis that a contextual analysis better

Proceedings of the Judicial Conference of the United States 33 (March 1991). This report plays a prominent role in the Supreme Court's subsequent opinion in *Amchem Products*. See *Amchem Prod., Inc. v. Windsor*, 117 S. Ct. 2231, 2237-38 (1997). Indeed, the United States Congress has been debating how or whether to legislate regarding the asbestos litigation crisis since the 1980s. See, e.g., *Occupational Diseases and Their Compensation, Part 1: Asbestosis-Related Diseases, hearings Before the Subcomm. on Labor Standards of the House Committee on Education and Labor*, 96th Cong. (1979) (hearings focused on HR 2740, the Asbestos Health hazards Compensation Act); *Proposed Asbestos Claims Facility, Hearings Before the Subcomm. on Labor of the Senate Committee on Labor and Human Resources*, 99th Cong. (1985) (hearing to discuss proposal to establish a claims facility for compensation of victims of asbestos-related occupational diseases); *Asbestos Litigation Crisis in Federal and State Courts, Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Committee on the Judiciary*, 102nd Cong. (1991-92) (hearings to discuss asbestos litigation crisis in federal and state courts); *The Problems in Asbestos Litigation, Hearing Before the Subcomm. on Courts and Administrative Practice of the Senate Committee on the Judiciary*, 102nd Cong. (1992) (hearing regarding the problems in asbestos litigation); see generally Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475 (1991) (exploring the procedures used in two asbestos class actions).

That many judges suggest that mass torts, particularly asbestos, can only be dealt with through legislative enactment does not mask the fact that Congress has not acted, and likely will not. As well, asbestos litigation participants, plaintiffs, defendants, and their lawyers appear not to be objective about the methods of resolving that litigation. On this point, see the very different accounts of the settlement by the majority and dissenting opinions in *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996). Professor Coffee, who testified on behalf of the objectors to the *Amchem Products* class action asbestos settlement, has thoroughly explored the asbestos litigation and its inappropriateness for settlement class action treatment. Coffee, *supra* note 4, at 1384-1404. Professor Coffee explores the relationship of the actors in the asbestos litigation and the arguably "collusive" settlement they reached of all future claims against the main non-bankrupt defendants left fighting the litigation. Professor Coffee chronicles the way in which plaintiffs' counsel came to be involved in settlement negotiations in *Amchem Products*, through apparent selection by defense counsel, and he explores the details of the settlement, an over-100 page document. The settlement included a relatively large settlement of the plaintiffs' lawyers "inventory" of present injury claims compared to the smaller settlement of similar claims of the represented future claimants. One is left to speculate on the relationship between the two results, hence the suspected "collusive" nature of the settlement process. *Id.* at 1394-97. For a discussion of the Supreme Court's resolution of *Amchem Products*, see *infra* notes 139-48 and accompanying text.

serves both proceduralist and tort policy concerns requires the conclusion that asbestos litigation is inappropriate for class action treatment. Any discussion of class actions and mass torts must be engaged in without focus exclusively, or even primarily, on asbestos litigation.

The definition of mass torts appropriate for class action treatment thus includes those non-asbestos mass torts whose large claimant pool and discrete number of potentially culpable parties are brought together as the result of conduct confined to a defined time period in which the defendants engaged in behavior that presented virtually identical risk to all the claimants. The mass torts involving silicone gel breast implants and many other medical devices, tobacco (on a possibly more limited scale), and HIV-infected blood products will be included in this group. The relationship between the institutional defendants and the injured claimants is a distant and impersonal one, involving only the injurious use of a defective product, possibly related to misrepresentations in marketing schemes directed to entice the public at large. Consequently, no meaningful difference based on the nature of the parties' relationship exists on which to base liability as might be the case in other contexts, like medical malpractice or automobile accident cases. These mass tort cases, therefore, can be litigated using the class action because the crucial aspect of the cases is identical across the claimant spectrum: culpability.²⁹ Whether culpability exists, in the sense of a breach of duty or strict liability, product defectiveness is not claimant-dependent but rather is driven by the conduct of the defendants and is based on the very limited range of bases of tort responsibility. The institutional actors involved acted culpably or not with regard to the entire class of the consuming public since these mass torts involve mass marketing of allegedly defective products, and thus responsibility can and should be determined in the context of the collective harm.

²⁹ One of the criticisms of the use of the class action is that more than one state's law may be applicable, thus preventing the commonality of issues required by the Federal Rules of Civil Procedure. As will be discussed in detail *infra* at notes 281-97 and accompanying text, this purported problem is, at most, a red herring that devolves into an argument that individualized adjudication is the only proper model for resolving this litigation. While recognizing that many different tort bases of liability exist for one course of conduct—negligence, strict liability and others—the underlying nature of the relationship between the institutional defendants and the mass tort claimants is the same and should be the central focus of the resolution of responsibility.

Rule 23 of the Federal Rules of Civil Procedure, permitting class actions, forms the basis for this Article's analysis of the mass tort class action.³⁰ This Article focuses on litigation and not settlement classes because tort responsibility rules are likely to be fully evaluated in public litigation and not through private settlement. Even though a significant number of civil actions are settled,³¹ situations often exist where settlement only comes after determinations by the judicial system of responsibility—the asbestos and Dalkon Shield litigation history speaks loudly on this point. The resolution of liability by virtue of the limited issue class,³² as attempted in *Castano v. The American Tobacco Company*³³ and *In re Rhone-Poulenc Rorer, Inc.*,³⁴ is, therefore, an important component of effectuating tort responsibility values. Defendants often fear litigation class actions precisely because the extent of the harm caused by the allegedly tortious conduct is so great. When one institutional defendant is opposed by one individual claimant, the extent of the defendant's failed responsibility can be masked in many ways—behind the victim's own contributory fault or lack of causation or the fact-quagmire of

³⁰ This Article focuses on the class action permitted by FED. R. CIV. P. 23(b)(3), the so-called common issues class which permits class certification when common questions of law or fact predominate over the individual issues and the class action is a superior method of adjudication of those issues. Rule 23(b)(3) is, further, a voluntary, opt-out class which permits any plaintiff who wishes to avoid involvement in the class. This type of class is the most frequently sought in mass tort cases. Rule 23(b)(1) permits mandatory certification in cases where the pursuit of separate actions risks inconsistent adjudications establishing varying standards of conduct by the defendants, or where those adjudications might be dispositive of the interests of others. The class in *In re Asbestos Litigation* was a Rule 23(b)(1) class, also known as a limited fund class. 90 F.3d at 982-83. Rule 23(b)(2) permits mandatory certification in cases where equitable relief is sought. Rule 23(b)(2) was used to attempt certification of the punitive damages issue in the Dalkon Shield litigation in the early 1980s, and was rejected. See *In re Northern Dist. of Cal., Dalkon Shield Etc.*, 693 F.2d 847 (9th Cir. 1982).

³¹ See Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1100 n.17 (1996). A recent study of class actions in federal courts, a study commissioned by the Federal Judicial Center, found that settlement and trial rates for the class actions studied in four federal districts were consistent with a general trend toward fewer trials and more settlements in civil litigation in federal district courts. There was not a higher rate of settlement in the class actions certified than in civil actions not certified. THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 90 (Federal Judicial Center 1996) [hereinafter EMPIRICAL STUDY].

³² See FED. R. CIV. P. 23(c)(4) (providing for a limited issue class).

³³ 84 F.3d 734 (5th Cir. 1996).

³⁴ 51 F.3d 1293 (7th Cir. 1995).

proximate cause. When an entire industry is opposed by substantially all those harmed by the defendants' failure of responsibility, that industry cannot so easily hide its irresponsibility behind individual causation and defenses that shift the focus from the defendants' irresponsibility. Defendants might be expected to staunchly oppose class actions on liability—the individualized adjudication model provides them with as many chances to escape responsibility as there are victims.

This Article proceeds, then, to advance the use of the litigation class action. Part I describes the goals of the device and provides a historical background on the use and underuse of class actions in mass torts cases. Then, Part II explores the recent court of appeals and trial court cases dealing with class certification in mass tort cases and identifies the rationales given for those holdings, both for and against certification, though most of those cases are against certification. Part III responds to the criticisms of mass tort class actions and identifies and explains the important reasons that support class action certification in the mass tort context. This Part argues that the appropriate use of the mass tort class action is consistent both with the goals of judicial system integrity and fairness to litigants—goals so often identified as reasons to deny class action certification. Part IV explains why the goals of tort law can be effectively pursued in mass tort cases through judicial aggregation methods like the class action.³⁵ Further, in response to the proceduralists concern about judicial integrity, Part V explores some basic tenets of the concept of judicial integrity and concludes that any loss of judicial integrity resulting from mass tort class actions comes not from the use of the class action method, but rather, from the unreasonable and unnecessary rejection of the class action method resulting from an overly aggressive commitment to the individualized litigation model. Part V proposes the increased use of the limited issue

³⁵ This Article assumes that the judiciary is the appropriate final arbiter of the legal claims presented in the mass tort context and must assume responsibility to solve its problems. While others have advocated congressional intervention, Congress cannot be expected to act in this area, as is evident from its failure to act in the asbestos context as described *supra* in note 28. The bankruptcy system, while an alternative, is not, as some have argued, a realistic, efficient or appropriate venue for the resolution of the thousands of tort claims institutional defendants cause. See Coffee, *supra* note 4, at 1457-1461 (arguing for Chapter 11 bankruptcy reorganization as superior method of adjudicating mass tort claims than class action). While some bankruptcies have handled personal injury claims well, others clearly have not.

class action as a way to balance the substantive tort and procedural integrity concerns.

I

THE HISTORY OF CLASS ACTIONS IN MASS TORT LITIGATION

To understand the current state of the use of the class action and appreciate why those engaged in the debate over its use in the mass tort context are so polarized, the goals of the class action must be explored. The appellate judiciary has, for the most part, appeared unwilling to consider the class action a tool of both substantive and procedural goals, and has instead focused on the class action's usefulness in resolving daunting caseload management problems.³⁶ The efficiency goals are, however, only a part of the device's historical purpose.³⁷

A. *The Historical Goals of the Class Action Procedure*

The class action rule is an invention of equity,³⁸ created in English courts of chancery as a matter of convenience to afford relief to parties before the court in spite of their inability to comply with then-compulsory joinder rules.³⁹ In its more modern form, the class action has been described, in addition, as a means of "protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a conve-

³⁶ When asked to identify the early signs of a litigation crisis in the asbestos litigation, Professor Deborah Hensler of the RAND Institute for Civil Justice said to the Judiciary Committee of the United States Senate:

As we increasingly deal with cases that arrive in this fashion of tens of thousands of cases with difficult questions involving causation, I think the courts need to be responsive in trying to come up with innovative procedures for dealing with those. In my judgment, in the early 1980's when some of the trial judges who were most familiar with those cases tried to come up with innovations, they met a fair amount of resistance from the appellate courts, and I think looking back with hindsight, we can say perhaps we should have been a little faster to recognize that these were a different kind of case.

The Problems in Asbestos Litigation, Hearing Before the Subcomm. on Courts and Administrative Practice of the Senate Committee on the Judiciary, 102nd Cong. 6 (1992) (testimony of Deborah R. Hensler).

³⁷ For a discussion of the challenges aggregation models generally pose to the adjudicatory process, see Resnik, *supra* note 9, at 5.

³⁸ 1 HERBERT NEWBERG AND ALBA CONTE, NEWBERG ON CLASS ACTIONS § 1.02, at 1-6 (3d ed. 1992) (citing *Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940)) [hereafter NEWBERG ON CLASS ACTIONS]. See also *id.*, § 1.06, at 1-17.

³⁹ *Id.* § 1.06, at 1-17.

nient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.”⁴⁰

The central administrative convenience goal is to be coupled, therefore, with a concern for providing a mechanism by which vulnerable members of society can combine forces to achieve the resolution of a common problem. Justice Douglas described this goal as follows:

I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief

The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.⁴¹

The Supreme Court has called the class action a “nontraditional form[] of litigation.”⁴² The class action procedure thus evolved as a product of concern for the “convenient and economical” provision of justice,⁴³ coupled with the substantive concern of affording a meaningful remedy to large numbers of otherwise disenfranchised victims of breached obligations.⁴⁴

The class action is a representational device that expresses the

⁴⁰ United States Parole Comm’n v. Geraghty, 445 U.S. 388, 402-03 (1980).

⁴¹ Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 185-86 (1974) (Douglas, J. dissenting) (footnotes omitted).

⁴² Geraghty, 445 U.S. at 402. See also NEWBERG ON CLASS ACTIONS, *supra* note 38, § 1.01, at 1-2. Identifying the class action as “nontraditional” speaks volumes about the judiciary’s general attitude toward it, particularly given the forcefulness of the Supreme Court’s voice as the speaker.

⁴³ See American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) (efficiency and economy of litigation a principal purpose of the procedure).

⁴⁴ See also Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 500-01 (1991) (in-depth study of post-aggregation management techniques by two federal judges in two significant asbestos mass tort cases: Judge Robert Parker in *Cimino v. Raymark Indust.*, and Judge James Kelly in *In re School Asbestos Litigation*). But see Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579 (1994) (criticizing “public law” vision of mass tort actions as judicial overreaching); cf. Hon. Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323 (1984) (class action device promising for accommodating competing interests).

substantive needs of a large number through the authority of a selected "voice" to speak for and promote recovery for those needs. Given the representational nature of the class action lawsuit, the inclusion in 1966 of Federal Rule 23(b)(3), the provision authorizing an opt-out class involving common questions most frequently used in mass tort litigation, was considered "the most adventuresome" innovation.⁴⁵ The inclusion of the "common questions" class, where common questions predominate and the class action is superior to other procedures, resulted from a recognition that situations exist where, even though class action treatment is not as clearly called for as in traditional contexts, its use might achieve "economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."⁴⁶ The tripartite goals to promote individual autonomy, judicial efficiency, and increased access to justice were ultimately balanced by the drafters in favor of a provision that was intended to facilitate an increased use of the class action.⁴⁷

The need for the class action method of resolving claims has never been considered great when the value of the claimants' individual claims are significant. As the Supreme Court recently observed in *Amchem Products, Inc. v. Windsor*:

While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."⁴⁸

⁴⁵ See Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (discussion by Reporter of the Rules amendments about inclusion of the 23(b)(3) class). See also *Amchem Prod., Inc.*, 117 S. Ct. at 2245. See generally EMPIRICAL STUDY, *supra* note 31, at 1-3 (discussing Rule 23 debate generally in historical perspective).

⁴⁶ FED. R. CIV. P. 23(b)(3) advisory committee's note (1966 Amendment). See 39 F.R.D. 69, 102-03 (1966); 1 NEWBERG ON CLASS ACTIONS § 1.10, at 1-29 (3d ed. 1992) ("There is a long tradition of power in the courts to promote this objective of enhancing the administration of justice.").

⁴⁷ See *Amchem Prod., Inc.*, 117 S. Ct. at 2246 (discussing work of the Reporters who cautioned that use of the new provision should be closely evaluated given its potential for increased use). See also EMPIRICAL STUDY, *supra* note 31, at 1 ("[o]pinions became polarized, with class action proponents seeing the rule as 'a panacea for a myriad of social ills' and opponents seeing the rule as 'a form of legalized blackmail'").

⁴⁸ 117 S. Ct. at 2246 (citation omitted). The Court continues:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any indi-

The premise of this position is that persons with large damages, as in most personal injury cases, have a strong interest in controlling their own litigation, and making settlement decisions accordingly, because so much is at stake. The loss of that autonomy in a case of significant individual damages, therefore, according to the prevailing view, would counsel against class action treatment. This common wisdom informed the decisions on the use of the class action in the mass tort context for most of the three decades since the Rule's amendment. This Article will now turn to an explanation of the evolution of the use of the mass tort class action.

B. Evolution of the Modern Class Action Procedure

1. Rule 23 Amended and Expanded

As a representative suit on behalf of a group of similarly situated persons, even the earliest class action procedure could have been expected to be a controversial vehicle because of the potential, whether real or imagined, to bring about instant and significant redress of grievances by institutional and government defendants. In its pre-1966 form, however, Rule 23 did not have such an effect, primarily because of two limitations: (1) the requirement that there be a jural relation between the parties to support class certification, and (2) the rule that negative judgments were non-binding on non-class members in the broadest type of class action, the "spurious" action, the predecessor to the "common questions" class in present Rule 23(b)(3).⁴⁹

The amendments to Rule 23 in 1966 were adopted after consideration of these two main limitations. The three subdivisions of amended Rule 23(b), into one of which a class action must fall to be certified, were intended to describe "in more practical terms the occasions for maintaining class actions."⁵⁰ Subdivision (b)(3),⁵¹ which requires predominance of common questions and

vidual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Id. (citing *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

⁴⁹ See *Hansberry v. Lee*, 311 U.S. 32, 40-42 (1940); 1 NEWBERG ON CLASS ACTIONS, § 1.10 at 1-26.

⁵⁰ FED. R. CIV. P. 23(b), advisory committee's note (1966 Amendment).

⁵¹ Subdivision (b)(3) states:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

superiority of the class action method of resolving those common questions, was not, at the time, considered appropriate for mass tort cases. According to the Advisory Committee, "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways."⁵² This unstudied observation by the Advisory Committee has become the rallying cry for opponents of the class action's use in resolving "mass accident" litigation.⁵³

The amendments to Rule 23 were intended both to clarify and to broaden the use of the class action.⁵⁴ The class action proce-

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Rule 23(b)(1) and (b)(2) deal with classes based on the dispositive effect of inconsistent adjudications on limited funds and equitable relief, respectively, and are generally considered not appropriate for mass tort class actions. The limited fund class, however, is often sought in cases where a defendant may be subject to excess liability over its net worth, or some similar measure, and claimants will, therefore, seek a class action to allocate that limited fund. *In re Asbestos Litigation*, 101 F.3d 368 (5th Cir. 1996), was just such a class action.

⁵² FED. R. CIV. P. 23(b)(3) advisory committee's note (1966 Amendment).

⁵³ The communications between members of the Advisory Committee regarding Rule 23 that partially explain the drafting history of the Rule are chronicled in Resnik, *supra* note 9, at 14. Professor Resnik suggests that the reference to mass accidents as inappropriate for class action treatment may be an overstatement of the Advisory Committee's actual position. *Id.*

⁵⁴ See generally 1 NEWBERG ON CLASS ACTIONS § 1.01 at 1-4. Indeed, it has been said that "[i]n 1966 the Supreme Court promulgated an entirely new Rule 23." STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 238 (1987). Professor Yeazell has written a detailed history of group litigation and connects the device with its political and social roots. Of the basis for the modern class action, Professor Yeazell suggests that the Rule suffers from "an uncertain rationale," identifying the failure of the drafters "to arrive at a unified theory of the device," and choosing instead to incorporate several conflicting theories into a single rule. *Id.* at 238-39. The theories, Professor Yeazell urges, are based in social context and substantive law rather than in an idea of representation or of interest. *Id.* at 239. "For the modern class action as for its predecessors, context matters. Indeed, this most recent transformation of group litigation makes sense only when viewed through the lenses of social structure and beliefs; that viewpoint makes com-

ture then soon came to be linked with the right to maintain private attorney general litigation, and was increasingly seen as disconnected from the traditional one-on-one method of adjudication which it was only occasionally to replace.⁵⁵ In fact, the Supreme Court at the time described the class action suit as “an evolutionary response to the existence of injuries unremedied by the regulatory action of government.”⁵⁶ The Court explained, “[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective re-

prehensible what otherwise appears to be a confused and inconsistent stance toward representative litigation.” *Id.* at 239-40. According to Professor Yeazell, the social structure of the 1960’s must be recognized to include racial strife and the quest for civil rights enforcement, consumer advocacy movements, and a general social outcry against “the establishment” status quo—corporations, the government, and institutions whose conduct was perceived to have a profound socially detrimental effect, either through active malfeasance or inattentive nonfeasance. *Id.* at 239-45.

⁵⁵ *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). The Court, in *Roper*, a case challenging allegedly usurious interest rates under the National Banking Act, stated:

The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise. Plainly there has been a growth of litigation stimulated by contingent-fee agreements and an enlargement of the role this type of fee arrangement has played in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost. The prospect of such fee arrangements offers advantages for litigation by named plaintiffs in class actions as well as for their attorneys. For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the “private attorney general” for the vindication of legal rights; obviously this development has been facilitated by Rule 23.

Id. at 338 (citation omitted).

⁵⁶ *Id.* at 339. In both *Roper* and *Geraghty*, the Supreme Court

recognized that the right to have a class action certified in appropriate cases is more akin to the right to maintain private attorney general litigation than to the traditional requirement to demonstrate a personal stake in the outcome of the litigation, for purposes of avoiding mootness after a properly commenced lawsuit. This enforcement or deterrence objective of class actions, in addition to arising out of their private attorney general nature, is also supported by the recognition that class actions serve to afford remedies for injuries unremedied by the regulatory action of government, and they enhance the effectiveness of private attorney general litigation that otherwise might be brought only on an individual basis.

1 NEWBERG ON CLASS ACTIONS § 1.06, at 1-19 (citations omitted). For a criticism of the use of class actions as private attorney general litigation, see John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215 (1983).

dress unless they may employ the class-action device.”⁵⁷ The types of cases so perfectly suited for the class action procedure include civil rights violations against one entity or a group, widespread employment discrimination by one employer, and similar dignity harms directed at a group of individuals whose harm, while real, is not easily quantifiable in the sense of personal injury tort damages.⁵⁸ While many claims in mass tort litigation cannot be said to be “small individual suits for damages” in the narrow sense implied by the Court, and the Advisory Committee, they are nonetheless the types of suits for which “aggrieved persons may be without any effective redress” in the sense intended by the spirit of the Rule, very much like the civil rights and employment cases for which the Rule has been so effectively used.⁵⁹

2. *Mass Products Liability Cases and the Class Action—of Asbestos and Dalkon Shield*

While Rule 23 was being revised, the substantive side of the “mass tort” equation was undergoing significant activity. In 1964, the American Law Institute promulgated Section 402A of the Second Restatement of Torts which adopted strict liability for defective products. This action had been preceded by decades of erosion of the many obstacles to recovery for plaintiffs injured by defective products,⁶⁰ and it reflected the ultimate recognition that liability for defective products should be strict, non-fault

⁵⁷ *Roper*, 445 U.S. at 339. The Court in *Roper* was asked to determine whether a class action alleging usurious finance charges made by the defendants against the class based on the National Bank Act, was moot for purposes of appellate jurisdiction because of a tendered offer of judgment for a minimal amount forced on the plaintiff class by the trial court. *Id.* at 330-31. In discussing the class action procedure generally, the Court stated:

That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences.

Id. at 339.

⁵⁸ 1 NEWBERG ON CLASS ACTIONS § 1.06, at 1-17.

⁵⁹ See, e.g., *Hansberry v. Lee*, 311 U.S. 32 (1940) (class action used to challenge race-based property restrictions); *United States Parole Comm’n v. Geraghty*, 445 U.S. 388 (1980) (class action to challenge constitutionality of parole guidelines).

⁶⁰ The history of tort recovery for defective product injuries has been chronicled in a number of places. See, e.g., Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1230-35 (1993), and citations therein.

based.⁶¹ Strict liability for defective products, primarily through Section 402A, created a profound change in the opportunity for injured plaintiffs to succeed in products liability actions.⁶² An increase in products liability cases occurred throughout the 1960s and 1970s, at the same time that the class action procedure was increasingly used as a method of resolving group harms in the civil rights, employment discrimination, and consumer rights cases. It is not at all surprising that these concurrent trends would eventually converge, particularly with the increasing onslaught of asbestos cases after the seminal case of *Borel v. Fibreboard Paper Products Corp.*⁶³ recognized the applicability of strict liability principles to asbestos failure-to-warn cases.

Early attempts to certify class actions in mass tort cases after the 1966 amendments were few and routinely met with defeat.⁶⁴

⁶¹ Section 402A provides that liability attaches to physical harm caused by a product in a defective condition unreasonably dangerous although "the seller has exercised all possible care in the preparation and sale of his product." RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965).

⁶² Much has been written on the societal effect of strict liability for defective products, its creation of an alleged insurance crisis in the 1980s, and its spurring of "tort reform" to save product manufacturers from greedy plaintiffs and plaintiffs' lawyers. See, e.g., W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY (1991); PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988). In 1991, the American Law Institute, currently in the process of re-stating the Restatement on Products Liability, studied the effect of the evolution of products liability rules and that effort led to the Restatement on Products Liability project recently completed. See AMERICAN LAW INSTITUTE, 1 & 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, (1991 Reporters' Survey); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Proposed Final Draft, approved by the ALI Council on May 21, 1997).

⁶³ 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

⁶⁴ See, e.g., *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759 (9th Cir. 1977) (aircraft crash); *Causey v. Pan American World Airways, Inc.*, 66 F.R.D. 392 (E.D. Va. 1975) (aircraft accident); *Yandle v. PPG Indus.*, 65 F.R.D. 566 (E.D. Tex. 1974) (asbestos workers exposure); *Ryan v. Eli Lilly and Co.*, 84 F.R.D. 230 (D.S.C. 1979) (DES class action certification motion denied); *Mink v. University of Chicago*, 460 F.Supp. 713 (N.D. Ill. 1978) (same). Compare *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973) (food poisoning case; class certified though abuse of class action device noted).

Most other non-product related mass tort class actions failed in the early 1980s, including the Kansas City Hyatt Hotel skywalk collapse. See *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982); But see *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982) (certification of mass accident arising out of nightclub fire upheld; one of the first in the country); see generally Coffee, *supra* note 4, at 1344 n.2 (discussing federal judiciary's general unwillingness to certify mass tort class actions). For a discussion of the greater propriety of class actions in "mass accident" rather than "mass tort" cases, see Coffee, *supra* note 4, at 1358 (in the mid- to late 1980s, courts became increasingly less reluctant to certify mass tort cases than mass accident cases,

The three reasons most often given for this refusal were: (1) Personal injury plaintiffs, whose claims are monetarily significant, should retain control over their own cases and are entitled to the individualized treatment that the class action does not allow;⁶⁵ (2) Class actions encourage unethical lawyer conduct because of the large fees generated by the aggregate value of the class' harm and the potential for solicitation;⁶⁶ and (3) The issues in tort litigation, like causation and comparative fault, are too diverse and claimant-specific to be considered common or predominant as required by Rule 23(b)(3).⁶⁷ In the late 1970s and early 1980s, at about the same time that products liability actions generally were on the increase, three "defective" products gave rise to thousands of injury claims, creating the "mass torts" that have since grabbed the attention of society and the federal judiciary.⁶⁸

though it appears that mass accident cases are more appropriate for class action treatment).

⁶⁵ This view has been variously expressed but takes its most poignant form in a statement by Professor Charles Alan Wright: "When personal injury and death claims are involved, a strong feeling prevails that everyone enmeshed in the dispute should have his own day in court and be represented by a lawyer of his choice. . . . Thus [the use of a class action in mass torts] is particularly unattractive to those who believe the device to be inconsistent with the time-honored practice in personal injury cases. . . ." CHARLES A. WRIGHT & ARTHUR MILLER, 7B FEDERAL PRACTICE AND PROCEDURE § 1783, at 71-72 (2d ed. 1986). See also Resnik, *supra* note 9, at 9-10, 16-17; Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664 (1979).

⁶⁶ The professional ethical problems class actions seem to create have become as important an inhibitor to the use of the procedure as the concern for individualized treatment, which had historically been the primary concern. This problem is detailed in Coffee, *supra* note 4, at 1367-84. Judge Jack Weinstein, who presided over the Agent Orange class action settlement and who has handled a large number of asbestos cases, has recently surveyed extensively the ethical problems in mass tort cases. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994). For early cases recognizing the problem, see *Causey v. Pan American World Airways*, 66 F.R.D. at 397 (concern for ambulance-chasing effect of class action procedure); *Yandle v. PPG Indus.*, 65 F.R.D. at 569 (concern for solicitation contributed to defeat of class action certification). For a discussion of ethical concerns in institutional class action litigation, see Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

⁶⁷ A formal reading of the Rule suggests its requirements are not met typically in mass torts because of the variety of claimant-specific issues that arise in tort litigation. See FED. R. CIV. P. 23(b)(3) advisory committee's note.

⁶⁸ There are, of course, state class actions and the state courts have handled many asbestos and other mass tort cases. The federal judiciary, however, is most often considered in crisis because so many federal districts in the system are dealing with mass tort cases, particularly asbestos cases. The federal judiciary has been the most visible battleground of mass tort actions. See generally DEBORAH HENSLER ET AL.,

The presence of these mass torts—asbestos, Agent Orange, and the Dalkon Shield intrauterine device—in the judicial system seemed to have affected a change in attitude of the trial, and to a lesser extent, appellate, judiciary which was evidenced by a greater willingness to certify class actions.⁶⁹

In 1981, Judge Spencer Williams certified a class action in the Dalkon Shield litigation against manufacturer AHRobins Pharmaceuticals.⁷⁰ Judge Williams certified a nationwide class of punitive damages claimants to resolve the thorny problem of multiple punitive damages verdicts against the defendant for essentially one course of conduct.⁷¹ The Ninth Circuit Court of

ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 24-30 (1985). For a suggestion that state courts should be the location for consolidation of mass tort cases, see Weber, *supra* note 11. It is important to bear in mind that state courts have only fourteen times as many general jurisdiction judges as do the federal district courts but do 90 times the number of criminal cases and 26 times the civil cases. Brian J. Omstrom & Neal B. Kandel, *Examining the Work of State Courts: A National Perspective from the Court Statistics Project*, 1994 NAT'L CENTER FOR STATE COURTS 7. This report concludes that the recent trend toward stable or even declining court caseloads is continuing, citing the declining fraction of the general jurisdiction caseload that tort cases represent. *Id.* at 23.

⁶⁹ For a general discussion of the trend in favor of certification of class actions in mass torts, see Resnik, *supra* note 9, at 17-18, 43-44 (identifying trend toward use of class action, chronicling move toward aggregation of cases); Coffee, *supra* note 4, at 1357-58 (suggesting that the burden on the courts from mass torts prompted shift in judicial attitude); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 947-48 (1995) (describing new legal regime, carried in by mass tort litigation since the 1960s, leading to "desperate improvisation" by judiciary to handle); NEWBERG ON CLASS ACTIONS, § 17.17 at 17-45 to 17-53.

Professor Richard Marcus suggests that the trend to increase use of the class action device beginning in the late 1980s represents an attempt by the federal judiciary to reform tort law in ways that would enable the resolution of issues and claims as to which the states had become "immobilized," suggesting inappropriate judicial legislation by the federal courts. Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 864-867 (1995).

⁷⁰ *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig.*, 521 F. Supp. 1188 (N.D. Cal.), *modified*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom. A.H. Robins Co. v. Abed*, 459 U.S. 1171 (1983). Judge Williams certified the class on his own motion, over objections of both plaintiffs and defendants, after receiving briefing on class certification from the parties. *Id.* at 1191. The punitive damages class was certified as a mandatory, non-opt-out, limited fund class under FED. R. CIV. P. 23(b)(1)(B). *Id.* at 1193. In addition, the court certified a class on liability for all California plaintiffs. *Id.* at 1194.

⁷¹ *Id.* at 1191. Judge Williams' arguments in favor of class action treatment were those often made about the excessive punishment, and violation of due process, that comes with multiple punitive damages awards against one defendant in products liability cases: There will be later plaintiffs who will get no compensatory damages if a defendant is bankrupted as a result of earlier punitive awards, and the defendant should not be subjected to multiple punitive damages awards for one course of con-

Appeals reversed, suggesting that Judge Williams had gone too far in certifying a case without adequately exploring the Rule's prerequisites and, essentially, over-managing the litigation.⁷²

Between the asbestos cases and the Dalkon Shield litigation, the courts in the early 1980s seemed to have their hands full. But as the Vietnam war veterans continued to reenter society, the effects of the use of Agent Orange as a defoliant during the war began to present a judicial, as well as a personal, problem. Only a few companies manufactured the chemical under the Defense Production Act and, in the early 1980s, thousands of veterans sought recovery from those companies for a variety of ailments allegedly resulting from their exposure during the war.⁷³ The

duct. *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 899-900 (N.D. Cal. 1981). On the availability of punitive damages generally in products liability litigation, see David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 46 (1982). For recent Supreme Court treatment of the constitutionality of punitive damages, see *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Judge Williams also certified a liability class of all California federal court plaintiffs. *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 521 F. Supp. 1188, 1192 (N.D. Cal.). This class, too, was decertified because Judge Williams failed to explore the Rule 23(a) requirements of typicality and adequacy of representation, as well as the superiority and predominance requirements of Rule 23(b)(3). *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 693 F.2d 847 (9th Cir. 1982).

⁷² *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 693 F.2d 847, 850, 852 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). Judge Williams' response, in defense of his decision and in defense of mass tort class actions in limited issue-common question cases, prophetically describes the tension between the trial and appellate judiciary. The Honorable Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323 (1983).

At approximately the same time as the Dalkon Shield litigation, cases involving birth defects allegedly caused by the morning-sickness drug Bendectin had been consolidated for pre-trial discovery in the Southern District of Ohio. *In re* Richardson-Merrell, Inc. "Bendectin" Prod. Liab. Litig., 533 F. Supp. 489 (J.P.M.L. 1982). The presiding district judge, Judge Rubin, after seeking briefing on the appropriateness of class certification, consolidated the over five hundred cases for trial under Fed. R. Civ. P. 42. After empaneling a jury, serious settlement negotiations ensued and the court certified a mandatory class for settlement purposes under Rule 23(b)(1), the limited fund provision. *In re* "Bendectin" Prod. Liab. Litig., 102 F.R.D. 239 (S.D. Ohio 1984). The Sixth Circuit reversed, concluding that there were insufficient fact findings to support the existence of a limited fund. *In re* "Bendectin" Prod. Liab. Litig., 749 F.2d 300, 306-07 (6th Cir. 1984). The court recognized, however, that a settlement class may well be appropriate and, as to the trial judge's efforts, "we certainly do not fault him for attempting to use this unique and innovative certification method. On pure policy grounds, the district judge's decision may be commendable, and several commentators have argued that Rule 23 should be used in this manner." *Id.* at 307.

⁷³ *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*,

Agent Orange litigation took hold in the court of another now-prominent mass tort judge, Judge Jack Weinstein in the Eastern District of New York.⁷⁴ Vietnam veterans who allegedly suffered injury from exposure to Agent Orange during the war sought and obtained class action certification of their claims against the manufacturers of the defoliant.⁷⁵ Judge Weinstein distinguished the Dalkon Shield litigation, finding that the main defenses to liability in the Agent Orange cases—the government contractor defense and the lack of scientific evidence of causation—were indeed common, and therefore class certification was proper.⁷⁶ The Second Circuit rejected mandamus on the certification question because of the commonality of the liability issue as among defendants and the need to obviate “a retrial in countless individual cases.”⁷⁷ Eventually, the court of appeals approved a settlement of that litigation, hesitatingly confirming the use of the class action.⁷⁸

725 F.2d 858 (2d Cir. 1984), *cert. denied*, 465 U.S. 1067 (1984). The Agent Orange litigation was eventually settled on the eve of trial. 818 F.2d 145 (2d Cir. 1987), *cert. denied sub nom.* Pinkney v. Dow Chemical Co., 484 U.S. 1004 (1988). The litigation has been extensively explored in PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* (1986). See also Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1001-1003 (1993) (summarizing Agent Orange litigation).

⁷⁴ Judge Weinstein has written frequently about the use of class actions in mass tort cases. His early scholarship criticized that use, see Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433 (1960) and Jack B. Weinstein, *Some Reflections on the “Abusiveness” of Class Actions*, 58 F.R.D. 299 (1973); but more recently he has advocated the class action method both as a means of providing relief to injured claimants, who require less individualized treatment, and as a means of providing for the good of the community of claimants. Jack B. Weinstein and Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269; Weinstein, *supra* note 67, at 233; and JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995).

⁷⁵ *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff’d*, 818 F.2d 145 (2d Cir. 1987), *cert. denied sub nom.* Diamond Shamrock Chemicals Co. v. Ryan, 465 U.S. 1067 (1984).

⁷⁶ *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff’d*, 818 F.2d Cir. 145 (1987) (opinion affirming settlement of class action). See also Marcus, *supra* note 10, at 886-887 (discussing inclusion of future claimants’ claims and noting that settlement offered defendants a deep discount because of the speculative nature of general causation evidence).

⁷⁷ *In re Diamond Shamrock Chemicals Corp.*, 725 F.2d 858 (2d Cir. 1984).

⁷⁸ Settlement of the original class certification was approved in *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987). The Second Circuit expressed skepticism concerning the usefulness of the class action device in mass torts generally, but ultimately upheld the Agent Orange class certification on the centrality of the government contractor defense’s applicability. See also, *In re “Agent Orange”*

The first appellate court officially to approve certification of a class action for a mass tort was the Fifth Circuit Court of Appeals in an asbestos case, *Jenkins v. Raymark Industries, Inc.*⁷⁹ Earlier attempts to certify class actions for asbestos litigation having failed,⁸⁰ the Fifth Circuit finally responded favorably to the trial court's effort to provide closure for at least some claimants, if not to the court itself. The Eastern District of Texas has had one of the largest asbestos dockets and Judge Robert Parker had certified a class of approximately 3000 plaintiffs as to the limited issues of: (1) "state of the art" evidence, (2) product identification, (3) product defectiveness, and (4) punitive damages.⁸¹ Upholding this common question-limited issue class under Rules 23(b)(3) and 23(c)(4), the Fifth Circuit observed:

The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters. . . . If Congress leaves us to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant's attorney to the extent enjoyed by the profession in the past.⁸²

In its next opportunity to certify an asbestos class action, the Fifth Circuit balked somewhat, and spoke broadly about the inappropriateness of class actions for mass torts. In only a few

Prod. Liab. Litig., 603 F. Supp. 239 (S.D.N.Y. 1985) (denying class certification in action against United States because of concern for future claimants).

⁷⁹ 782 F.2d 468 (5th Cir. 1986). The history of the asbestos litigation in the Eastern District of Texas, where *Jenkins* originated, is now legendary. That court has seen thousands upon thousands of asbestos cases, and in fact is home to the first case which recognized a right to proceed based on strict liability in an asbestos case. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

As mentioned at the outset of this article, the asbestos litigation should be treated as a subclass of mass tort litigation for many reasons, one of which is the long history that litigation has in certain federal districts where the judges *must* have a way of dealing with it in the aggregate or be drowned in it for the foreseeable future. Judge Robert Parker, now on the Fifth Circuit, has chronicled the history of the litigation in one of the landmark asbestos cases in which he attempted to come up with creative, aggregative management techniques. *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990). See also PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985); Coffee, *supra* note 4, at 1384-1404 (detailed history of asbestos class action litigation).

⁸⁰ See *Yandle v. PPG Indus. Inc.*, 65 F.R.D. 566, 569 (E.D. Tex. 1974).

⁸¹ *Jenkins*, 782 F.2d at 471.

⁸² *Id.* at 473 (citations omitted). After several weeks of trial, *Jenkins*, which involved approximately 1000 plaintiffs, settled. See MARK A. PETERSON & MOLLY SELVIN, *RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES* 39-48 (1988).

short years after *Jenkins*, the court of appeals partially rejected a class action certification for 3000 plaintiffs drawn from a single district, a virtually identical set of circumstances to that in *Jenkins*. Upon the Special Master's recommendation in *Cimino v. Raymark Industries, Inc.*,⁸³ Judge Parker certified a limited issue class under Rule 23(b)(3) as to product defectiveness and state-of-the-art defenses, general causation, and damages apportionment. The court of appeals issued a mandamus writ in *In re Fibreboard*⁸⁴ and decertified the class, but only as to the general causation issue.⁸⁵ Judge Parker had devised a plan to try causation based on eleven representative plaintiffs cases combining variations of work exposure and disease.⁸⁶ The defendants raised a number of concerns with the aggregation model of adjudication, chief among them a denial of due process and right to jury.⁸⁷

The court of appeals concluded that it was difficult to locate specific problems with either due process or jury trial right, and found a more amorphous concern linked tangentially to due process: an intuitive lack of fit between the suggested process and

⁸³ No. 86-0456, 1989 WL 253889 (E.D. Tex. Sept. 23, 1989).

⁸⁴ 893 F.2d 706, 712 (5th Cir. 1990) (case renamed on mandamus).

⁸⁵ *Id.* at 707 (noting that defendants complained about the common liability determination but acknowledged that it was consistent with *Jenkins*). The court also decertified the general causation class issue. *Id.* at 712.

⁸⁶ *Id.* at 708. The court of appeals explained the process which had been suggested by a special master appointed to explore alternatives:

[I]t was "self-evident that the use of one-by-one individual trials is not an option in the asbestos cases." The master recommended four trial phases: I (classwide liability, class representatives' cases), II (classwide damages), III (apportionment) and IV (distribution). . . . The district court concluded that the trial of these cases in groups of 10 would take all of the Eastern District's trial time for the next three years, explaining that it was persuaded that "to apply traditional methodology to these cases is to admit failure of the federal court system to perform one of its vital roles in our society . . . an efficient, cost-effective dispute resolution process that is fair to the parties."

Id. The jury in Phase II was to determine the percentage of exposure of each representative group to each defendant's products as well as the actual damages, in a lump sum, for each disease category. *Id.* at 709. In addition, the damages cases of thirty illustrative plaintiffs, fifteen each chosen by defendants and plaintiffs, would be tried. *Id.*

⁸⁷ *Id.* (stating that defendants contentions of due process denial and jury right violation "are variations of a common concern of defendants. Defendants insist that one-to-one adversarial engagement or its proximate, the traditional trial, is secured by the Seventh Amendment and certainly contemplated by Article III of the Constitution itself.")

the integrity of the judicial system.⁸⁸ Acknowledging Judge Parker's valiant effort to manage litigation that might never be concluded, the court of appeals nevertheless expressed concern that the proposed changes in procedure needed to try the causation issue would work a change in substantive rights and duties under Texas' focus on individual causation.⁸⁹ This, of course, overstates the common requirement of all torts cases that the plaintiff prove cause-in-fact. It is an inadequate response, however, to the use by substantially similarly-situated plaintiffs, who would likely never live to see their cases adjudicated, of a procedure intended to provide access to the system through mere issue simplification.⁹⁰

After *Jenkins* and *Fibreboard*, it seemed that a clear explanation of circumstances justifying class action certification was unlikely to be forthcoming from the appellate courts. But as the asbestos litigation proceeded in the Fifth Circuit, the Second Circuit handled the Agent Orange cases and the Dalkon Shield litigation evolved in the Fourth Circuit.⁹¹ Asbestos property

⁸⁸ *Id.* at 710-11. The court concluded that it was "difficult to describe concretely any deprivation of defendants' rights" but admitted feeling "a profound disquiet" at the thought of such a trial proceeding. *Id.* at 709-10.

The court acknowledged the lack of fit of the traditional adjudication model to mass exposure cases but concluded nonetheless that:

Phase II, while offering an innovative answer to an admitted crisis in the judicial system, is unfortunately beyond the scope of federal judicial authority. It infringes upon the dictates of *Erie* that we remain faithful to the law of Texas, and upon the separation of powers between the judicial and legislative branches.

Id. at 711.

⁸⁹ *Id.* at 712. The court stated:

The plaintiffs suffer from different diseases, some of which are more likely to have been caused by asbestos than others. The plaintiffs were exposed to asbestos in various manners and to varying degrees. The plaintiffs' lifestyles differed in material respects. To create the requisite commonality for trial, the discrete components of the class members' claims and the asbestos manufacturers' defenses must be submerged. The procedures for Phase II do precisely that, but, as we have explained, do so only by reworking the substantive duty owed by the manufacturers.

Id.

⁹⁰ Judge Parker subsequently tried the cases in a consolidated proceeding on remand with a slightly different approach, using statistical sampling of damages for different disease categories. See *Cimino v. Raymark Indus. Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990) (discussing trial procedures and defendants' continuing due process objections).

⁹¹ See *infra* notes 103-110 and accompanying text. The eventual certification of a punitive damages class in the Dalkon Shield litigation was a milestone event, with the Fourth Circuit Court of Appeals acknowledging the lost opportunity to deal with

damage suits involving school districts across the nation also were taking place. In the first school asbestos cases to seek it, the Third Circuit certified a class action praising the class action procedure in those cases⁹² because it “works an improvement over the situation in which the same separate suits require adjudication on liability using the same evidence over and over again.”⁹³ The court of appeals, mindful of the defense arguments that individual issues predominated, concluded that in a Rule 23(b)(3) class, the most important inquiry was not whether the issues were identical as to all defendants but whether they were common to the cases of the plaintiffs, and thus could be litigated in a unit.⁹⁴

Once the prerequisites of Rule 23(a) were found, the court’s superiority analysis acknowledged forthrightly that the traditional system’s inefficiencies compounded the perception of a judiciary incapable of handling the claims of innocent people—a judiciary wedded to a procedure which was not working for a significant number of people.⁹⁵ The court approved use of the

the cases before forcing the company into bankruptcy. *In re A.H. Robins Co.*, 880 F.2d 709, 738-40 (4th Cir. 1989) (comprehensive review of class action law to date; suggesting courts take full advantage of Rule 23(c)(4) limited issue classes).

⁹² *In re School Asbestos Litig.*, 789 F.2d 996, 1000-01 (3d Cir. 1986). The court summarized the background of asbestos litigation, calling it “an unparalleled situation in American tort law.” *Id.* at 1000. The court further recognized that traditional tort system procedures had been ineffective in disclosing the hazards of asbestos to workers and in encouraging manufacturers to reduce those hazards. *Id.*

⁹³ *Id.* at 1008 (determination of liability issues in one suit provides substantial resource savings); *accord* *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993) (noting that “significant economies may be achieved by relieving educational institutions of the need to prove over and over when defendants knew or should have known of asbestos’ hazards, or whether defendants engaged in concerted efforts to conceal this knowledge.”).

⁹⁴ *School Asbestos Litig.*, 789 F.2d at 1010. The court stated: “The focus, however, must be on whether the fact to be proved is common to the members of the class, not whether it is common to all the defendants.” *Id.* (agreeing with *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 472 (5th Cir. 1986), that the “threshold of commonality is not high.”) The court decertified the mandatory non-opt-out class on the issue of punitive damages, however. *School Asbestos Litig.*, 789 F.2d at 1005.

⁹⁵ The court stated:

Inefficiency results primarily from relitigation of the same basic issues in case after case. Since a different jury is empaneled in each action, it must hear the same evidence that was presented in previous trials. A clearer example of reinventing the wheel thousands of times is hard to imagine. Apparent inconsistency of jury verdicts has often been a reflection of the ability of the system to sort out individual differences and tailor redress to precise circumstances. In the asbestos litigation field, however, the variation in jury awards has led to complaints that injustice rather than careful apportionment has resulted.

Id. at 1001. *Compare* *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir.

limited issue class and noted the growing acceptance of that device in mass tort class actions where

[d]etermination of the liability issues in one suit may represent a substantial savings in time and resources. Even if the action thereafter 'degenerates' into a series of individual damage suits, the result nevertheless works an improvement over the situation in which the same separate suits require adjudication on liability using the same evidence over and over again.⁹⁶

The court recognized the very real manageability problems but erred on the side of trusting the trial judge, with familiarity in litigating complex matters, and encouraged judicious experimentation in the resolution of this intractable litigation.⁹⁷

Soon after the Fifth Circuit's *Jenkins* decision, the affirmance by the Second Circuit of the Agent Orange class action, and the Third Circuit's school asbestos class certification, the Fourth Circuit upheld class action certification of several issues in the Dalkon Shield intrauterine device litigation in *In re A.H. Robins Co.*⁹⁸ After A.H. Robins Company, Inc. (Robins) filed Chapter 11 bankruptcy in 1985 to avoid further liability, plaintiffs sued Aetna Casualty, Robins' insurer, because of its alleged involvement throughout the marketing of the Dalkon Shield and subsequent litigation over it.⁹⁹ As that action progressed, the parties came to a settlement, part of which was agreement on limited fund class action certification.¹⁰⁰ The Fourth Circuit, in uphold-

1985), *on reh'g*, 781 F.2d 394 (5th Cir. 1986) (seeking resolution of asbestos issues under federal common law).

⁹⁶ *School Asbestos Litig.*, 789 F.2d at 1008. The court further stated:

Reassessment of the utility of the class action in the mass tort area has come about, no doubt, because courts have realized that such an action need not resolve all issues in the litigation. *See* FED. R. CIV. P. 23(c)(4)(A). If economies can be achieved by use of the class device, then its application must be given serious and sympathetic consideration.

Id. at 1008-09.

⁹⁷ *Id.* at 1011. The court explained:

[A] district court must necessarily enjoy wide discretion, and we are not inclined to reverse a certification before the district judge has had an opportunity to put the matter to a test. We point out the critical fact that certification is conditional. When, and if, the district court is convinced that the litigation cannot be managed, decertification is proper.

Id.

⁹⁸ *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989).

⁹⁹ *Id.* at 717. A full history of the device's use and the litigation can be found in *In re A.H. Robins Co.*, 89 B.R. 555, 557 (E.D. Va. 1988).

¹⁰⁰ *A.H. Robins Co.*, 880 F.2d at 718, 719-20.

ing certification and the settlement, explained many of the social, political, and economic factors that continue to plague litigants and the courts in mass tort litigation and which militate in favor of the class action for resolution:

Within recent years, the proliferation in the development and distribution of new products and remedies and the complaints of injuries from the use of these products have brought an accelerating avalanche of mass products liability suits primarily in federal courts which represents what is, as we have already observed, probably the most important and difficult management problem facing the federal court system today. . . .

. . . .
When account is taken of the toll of such cases on the court system itself, it is evident that the proper functioning of the courts and the fair and efficient administration of justice for other litigants whose right to a judicial determination are inevitably delayed inordinately by the clogging of the court system by mass tort actions tried individually and the societal costs of the endless repetition of these suits in separate trials at substantial costs to the judicial system mean that a mechanism for deciding expeditiously, efficiently and relatively inexpensively these actions without the delays of individual suits is demanded.¹⁰¹

The court recounted the early, and in its opinion proper, view that Rule 23 should be liberally interpreted in favor of class certification¹⁰² and chronicled the misguided strict interpretation of the Rule that ensued after courts began to find class action management too difficult.¹⁰³ The court concluded that the reluctance to use class actions in mass tort cases “represents an unnecessary limitation on the efficient case management in federal courts of mass torts.”¹⁰⁴ The court noted somewhat wistfully that one of the cases which read Rule 23’s requirements too restrictively was

¹⁰¹ *Id.* at 725-26. The court quoted a number of articles which documented the costs of mass tort litigation and commented on its unprecedented levels. *E.g.*, Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429 (1986) (where Judge Rubin of the Sixth Circuit wrote mass tort claims “affect not only the litigants but other users of the court system; and their total human and economic costs affect all of society.”); Robert H. Sand, *How Much is Enough? Observations in Light of the Agent Orange Settlement*, 9 HARV. ENVTL. L. REV. 283 (1985); and Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control*, 52 FORDHAM L. REV. 37 (1983).

¹⁰² *In re A.H. Robins Co.*, 880 F.2d at 729.

¹⁰³ *Id.* at 729 n.27 (citing 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D §1754 (2d ed. 1986)).

¹⁰⁴ *A.H. Robins Co.*, 880 F.2d at 731.

the Dalkon Shield case in California that Judge Williams had tried to certify seven years earlier.¹⁰⁵

II

THE POST-MODERN CLASS ACTION PROCEDURE

At some point between the late 1980s and the mid-1990s, class action certification for mass torts ceased to be extraordinary and appeared to become, if not routine, not wholly unusual.¹⁰⁶ At least in the asbestos litigation, there appeared to be a steady number of classes certified,¹⁰⁷ the same was true for some medical device cases,¹⁰⁸ representing the Dalkon Shield heritage of the mass tort class action. The benefit of the class action having been at least partially realized and the burdens acknowledged and confronted, the excesses were soon to appear. Having discussed the good and the bad, we must confront the ugly.

A. Settlement Classes Take Over

Litigation moves inexorably toward settlement. Dispute resolution methods are supposed to resolve cases efficiently and effectively for the parties. Adversarial lawsuits are not the end of

¹⁰⁵ *Id.* at 732. One is left to wonder what difference it might have made to A.H. Robins and the thousands of claimants with significant injury and virtually valueless claims after the bankruptcy.

¹⁰⁶ As discussed above, many class actions were certified in mass accident cases, especially involving pollution/environmental contamination. *See, e.g.,* Sterling v. Velsicol Corp., 855 F.2d 1188, 1196 (6th Cir. 1988) (numerous courts have recognized the need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or a single course of conduct). In 1988, however, the New York Times had reported the "fall" of the class action. Douglas Martin, *The Rise and Fall of the Class Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7.

¹⁰⁷ *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. 32 (E. & S.D.N.Y. 1990) (certification granted for actions against Eagle-Picher Industries); *In re Ohio Asbestos Litig.*, 1990 WL 135766 (N.D. Ohio Aug. 1, 1990) (recertifying a limited fund class against Eagle-Picher Indus.); *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710 (E. & S.D.N.Y. 1991) (certification of class action seeking revision of obligations and payment procedures under Johns-Manville Chapter 11 bankruptcy reorganization plan); *In re Joint E. & S. Dist. Asbestos Litig.*, 1992 WL 60407 (E.&S.D.N.Y.) (certification of class of defendants by Keene Corp. under limited fund theory as Keene contemplated bankruptcy), *rev'd*, 14 F.3d 726 (2d Cir. 1993).

¹⁰⁸ *See* Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992) (proposed class action settlement in concave/convex heart valve litigation reasonable and would be approved); *In re Cordis Pacemaker Prod. Liab. Litig.*, 1992 WL 754061 (S.D. Ohio Dec. 23, 1992) (class certified regarding implanted cardiac pacemakers). *But see In re Tetracycline Cases*, 107 F.R.D. 719 (W.D. Mo. 1985) (limited issue class certification denied, individual issues predominated); *Mertens v. Abbott Laboratories*, 99 F.R.D. 38 (D.N.H. 1983).

the litigation system; they are the means to the end of resolution. And so, class actions, as all litigation processes before them, lead toward settlement perhaps more quickly and forcefully than most. Much of the recent criticism of class actions, and a point very directly made in *In re Rhone-Poulenc Rorer, Inc.*,¹⁰⁹ stems from the “blackmail settlement” aspect of class actions, especially those certified for settlement only and not for litigation.

A case in point is the silicone gel breast implant settlement class action certified in April 1994.¹¹⁰ It is perhaps the highly visible breakup of this settlement class that has brought class actions under the public microscope in recent years and which has led to renewed criticism of the class action. Thousands more claims were presented than could be accommodated with the substantial \$4.2 billion settlement fund, and partially as a result, the principal defendant, Dow Corning Corp., filed for Chapter 11 bankruptcy reorganization.¹¹¹ The vision of greedy, unmeritorious claimants fueled by similarly greedy plaintiffs lawyers forcing an otherwise respectable company into bankruptcy leapt readily to the mind of many citizens, and was so portrayed in the popular press.¹¹² Such visions are undoubtedly not lost on appellate judges.

While settlement classes are not the focus of this Article, the silicone gel breast implant litigation is important because of the anti-class action culture that has stemmed from it. While there are certain features of that litigation that may not have made it amenable to class action treatment,¹¹³ the backlash against class actions generally that seems to have resulted from it has spread

¹⁰⁹ See 51 F.3d 1293, 1298-1299 (7th Cir. 1995).

¹¹⁰ *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992) (consolidation order and selection of transferee forum); 1994 WL 114580 (N.D. Ala. April 1, 1994) (conditional settlement class certification).

¹¹¹ 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) (\$4.2 billion settlement agreement explained). The parties failed to renegotiate the settlement's terms and the court allowed claimants who originally elected to participate in the settlement to opt out. Claimants Given Option to Pursue Individual Lawsuits, Prod. Liab. Rep. (CCH) No. 843 (Oct. 16, 1995). The Dow Corning bankruptcy reorganization plan set up a \$2 billion settlement fund, the same amount offered in the defunct class action settlement fund, and sought a common trial on causation, not unlike a limited class action for causation. See 24 PROD. SAF. & LIAB. RPTR. (BNA) 1121 (Dec. 6, 1996). Plaintiffs' counsel objected to the class action-like trial on causation. See *id.*

¹¹² See Coffee, *supra* note 4, at 1404-10 (history of silicone gel breast implant litigation, in court and in the press).

¹¹³ See *supra* note 78 and accompanying text (discussing lack of general causation as possible major obstacle to class certification).

rapidly and fiercely. The combination of: (1) thousands of claimants lining up to receive a share in an apparently generous billion dollar fund so that the company establishing the fund chooses bankruptcy; (2) news of large attorneys fees generated by the settlement; and (3) widespread judicial concern over the lack of concrete evidence of causation of harm painted a picture representing all of the evils of mass tort class actions—the unmeritorious claimants, the greedy plaintiffs' lawyers, a destroyed corporate citizen, and a besieged judiciary.¹¹⁴ Because of the Dow Corning bankruptcy and the large number of claimants returning to the tort system after the settlement fund appeared insufficient, the class settlement simply fell apart.¹¹⁵

Quickly on the heels of the silicone gel breast implant class came an important decision by the Third Circuit Court of Appeals decertifying a very large settlement class involving allegations of defect in the side-saddle gas tank design of a General Motors pickup truck.¹¹⁶ Several thousand plaintiffs who were owners of the pickup trucks claimed lost value of their vehicles as

¹¹⁴ For a discussion of the scientific evidence of causation of silicone gel breast implant induced harm, see Heidi Li Feldman, *Science and Uncertainty in Mass Exposure Litigation*, 74 TEX. L. REV. 1 (1995). For a discussion of the history of the silicone gel breast implant generally, see MARCIA ANGELL, *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE* (1996) (director of the New England Journal of Medicine explains lack of fit between science and the litigation system specifically regarding silicone gel breast implant litigation).

¹¹⁵ See *In re Dow Corning Corp.*, 187 B.R. 919 (Bankr. E.D. Mich. 1995) (bankruptcy court denies Dow Corning's request to place valuation of claims as first priority); *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996) (suits against other implant manufacturers must await bankruptcy outcome because issues of contribution and indemnity of Dow Corning raised). See generally Nagareda, *supra* note 4, at 335-38 (discussion of silicone gel breast implant litigation).

¹¹⁶ *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995). After publicity over the cases in 1992 as the result of a news magazine report on the alleged defects and an enormous verdict against GM in Georgia, *Moseley v. General Motors Corp.*, 447 S.E.2d 302 (Ga. App. 1994), consumer class action lawsuits were filed in a number of jurisdictions. The cases were transferred to the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation and a settlement class was certified thereafter. See *General Motors Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 786-90. The court decertified the class because of adequacy of representation problems coupled with a finding of an unfair and unreasonable settlement. In the process, the court concluded that a settlement class must satisfy all Rule 23 requirements for a litigation class for certification. *General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 790. This holding was reiterated by the Third Circuit in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996).

a result of the design defect, but no personal injury.¹¹⁷ These plaintiffs reached a settlement with General Motors and filed for class certification and settlement approval at the same time.¹¹⁸ The trial court approved the settlement and the Third Circuit Court of Appeals decertified based on the failure of the trial court to assess whether the class met all of the Rule's requirements for a litigation class.¹¹⁹

The appellate court expressed particular concern over the trial court's inability to monitor the adequacy of representation because of the "lucrative opportunities for putative class attorneys to generate fees for themselves without any effective monitoring by class members who have not yet been apprised of the pendency of the action."¹²⁰ The increased incentive on defendants to settle in order to save transaction costs, coupled with lack of incentive by plaintiffs counsel to accommodate meaningfully the injuries of the class because of their virtual invisibility led the court to find inadequate representation.¹²¹ In addition, the court described with a measure of contempt the settlement terms which were much more favorable for fleet vehicle owners, who had more bargaining power than individuals, and which seemed generally unsatisfying because they contained many limitations on the ability of the plaintiffs to use the coupons which were being offered for the purchase of another GM truck.¹²² *General Motors Pickup Truck Litigation* represents the major problem with settlement classes—they reek of collusion between plaintiffs' attorneys and defendants because of the high attorneys fees and the perceived less than favorable terms for the claimants.¹²³

On the heels of *General Motors Pickup Truck Litigation*, the Third Circuit Court of Appeals was presented with an enormous asbestos settlement class of predominantly *future* injury claim-

¹¹⁷ 55 F.3d at 775.

¹¹⁸ *Id.* at 780.

¹¹⁹ *Id.* at 790.

¹²⁰ *Id.* at 788.

¹²¹ *Id.*

¹²² *Id.* at 790.

¹²³ In *General Motors Pickup Truck Litig.*, the settlement consisted of nontransferable coupons for \$1,000 off the purchase of another GM truck. *Id.* at 786-90. Plaintiffs had sought repair of their vehicles or refund of the purchase price. *Id.* at 780. Interestingly, a new settlement was devised only a few short months after the decertification. Gabriella Stern, *GM, Truck Owners Settle Fuel-Tank Safety Suit*, WALL ST. J., July 5, 1996.

ants. In *Georgine v. Amchem Products, Inc.*,¹²⁴ the court decertified a complex settlement of between 250,000 and 2,000,000 present and future injury claimants reached by a group of the remaining solvent defendants, the Center for Claims Resolution, and a small core group of plaintiffs' lawyers who have been instrumental in pursuing asbestos litigation since the 1960s.¹²⁵ *Georgine* illustrates why asbestos litigation must be treated as a unique piece of litigation that cannot stand as the paradigm for the resolution of mass torts by class action.

The court of appeals recognized the difficulty that asbestos litigation presents to all parties and the court system:

Asbestos litigation has burdened the dockets of many state and federal courts, and has particularly challenged the capacity of the federal judicial system. The resolution posed in this settlement is arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue.¹²⁶

Nonetheless, the court, after thoroughly examining the requisites of Rule 23, found class action status inappropriate, relying primarily on the lack of commonality or predominance under Rule 23b(3), and refusing to consider that the class was certified specifically for settlement purposes.¹²⁷

¹²⁴ 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* *Amchem Products Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

¹²⁵ *Id.* at 618-20 (thorough explanation of the complicated settlement agreement and the relationship between the parties and lawyers on both sides). On the *Georgine* case generally, see Coffee, *supra* note 4, at 1393-99 for an in-depth discussion of the problems of collusion between the two sides and the inadequate settlement terms for the futures plaintiffs.

¹²⁶ *Georgine*, 83 F.3d at 615. The opinion refers to the case as one of the "few great cases" in every decade that forces the judicial system to attempt to resolve a great social crisis while preserving its institutional values. *Id.*

¹²⁷ *Id.* at 625. For a discussion of the settlement versus litigation class debate prior to the Supreme Court's opinion in *Amchem Products*, see Symposium, *Mass Torts: Serving up Just Desserts*, 80 CORNELL L. REV. 811 (1995). The entirety of the issues involved in settlement classes is beyond the scope of this Article. The Judicial Conference is currently revising Rule 23 with particular focus on settlement classes. See PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE RULE 23. On the debate over this proposed rule, see *Proposed Class Action Rule Revisions Endorsed by American Bar Association*, 65 U.S.L.W. 2517 (Feb. 11, 1997); Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79 (1994) (endorsing the proposal as written in 1994 to expand use of the class action); William W. Schwarzer, *Structuring Multicclaim Litigation: Should Rule 23 be Revised?*, 94 MICH. L. REV. 1250 (1996) (advocates identifying Rule 23's failings before revising it to avoid "opening Pandora's box" from ill-advised changes); Richard B. Schmitt, *Plan for Class-Action Settlements Is Dividing Judges*, *Law Professors*, WALL ST. J., June 6, 1996, at B10.

Because the court of appeals' analysis relates to litigation classes, its observations are important to the present understanding of the mass tort class action. In particular the court states that the commonality barrier is higher in a personal injury damages class action that seeks to resolve all issues.¹²⁸ Such broad statements in the context of asbestos cases, for which there is no analogue, are dangerous given the likelihood that lower courts will leap upon them in future decisions for easy answers to vexing questions and use them as a panacea for all class action certification ills.¹²⁹ The court applied the high threshold and concluded that the common issues of liability in asbestos cases did not predominate. In doing so, it relied on the series of older class action cases discussed above which predated the trend toward class action certification represented by *Jenkins*, *Dalkon Shield*, and *In re School Asbestos*.¹³⁰ The court noted that limited issue classes are distinguishable and may indeed present appropriate class action treatment. The court expressed considerable concern over the inadequacy of representation of the named plaintiffs and the plaintiffs' attorneys conflict of interest between clients in different classes of injury.¹³¹

The next settlement class case, *In re Asbestos Litigation*,¹³² was upheld by the Fifth Circuit Court of Appeals on facts significantly different from *Georgine* because there was only one defendant, Fibreboard Corporation.¹³³ The Fifth Circuit upheld the settlement class certification, concluding that settlement classes do not have to meet the rigorous analysis of Rule 23(b) litigation classes.¹³⁴ Finding the existence of a settlement an important aspect of the certification analysis, the case does not further illuminate the Fifth Circuit's analysis of class actions generally given

¹²⁸ 83 F.3d at 625.

¹²⁹ See, e.g., *Hayes v. Playtex Family Prods. Corp.*, 168 F.R.D. 292, 295 (1996); *Harding v. Tambrands, Inc.*, 168 F.R.D. 290, 292 (1996).

¹³⁰ 83 F.3d at 625-26, 628.

¹³¹ *Id.* at 630-31.

¹³² 90 F.3d 963 (5th Cir. 1996), *remanded*, 117 S. Ct. 2503 (1997), *aff'd on remand*, 134 F.3d 668 (5th Cir. 1998).

¹³³ The class was certified as a Rule 23(b)(1)(B) limited fund class because of the dispute over the defendant's insurance coverage and its impending bankruptcy. *Id.* at 670. The court extolled the virtues of settlement as a way to avoid the uncertainty, risks and expense of ongoing litigation. *Id.*

On the use of class actions to avoid bankruptcy see *contra In re Joint E. & S. Dist. Asbestos Litig.*, 14 F.3d 726 (2d Cir. 1993) (decertifying class which sought solely to avoid bankruptcy by defendant seeking certification).

¹³⁴ *Asbestos Litig.*, 90 F.3d at 971.

the very recent decertification of a limited issue liability class in *Castano v. The American Tobacco Company*¹³⁵ that preceded it. Given the history in the Fifth Circuit of important class action certification decisions in the asbestos litigation,¹³⁶ the *In re Asbestos Litigation* opinion represents a significant victory for the defendant who successfully fought a class action on liability ten years earlier and who, for approximately \$10 million, obtained resolution of all future claims against it for a fraction of its net worth of \$225 to 250 million.¹³⁷

B. Amchem Products Inc. v. Windsor: *The Supreme Court Speaks on Settlement Classes*

The Supreme Court granted review of *Georgine/Amchem Products* “to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification.”¹³⁸ The Court concluded, contrary to the Third Circuit below, that settlement is relevant to a class certification.¹³⁹ The Court expressed the “overriding importance” of courts interpreting the rules as composed, noting that “the text of a rule . . . limits judicial inventiveness.”¹⁴⁰ The Court noted that the safeguards provided by the Rule’s criteria are not “impractical impediments—checks shorn of utility—in the settlement context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor’s foot kind—class certifications

¹³⁵ 84 F.3d 734 (5th Cir. 1996).

¹³⁶ For a discussion of the Fifth Circuit’s class action opinions in asbestos litigation before *In re Asbestos Litigation*, see *supra* notes 81-92 and accompanying text.

¹³⁷ See *Asbestos Litig.*, 134 F.3d at 670. A dissenting opinion scathingly disagrees with the majority’s selling out of the victims, an opinion written by Judge Jerry Smith, who also wrote the opinion in *Castano*, which strongly favored the tobacco defendants. See *Castano*, 845 F.3d at 737. The dissenting opinion points specifically to the collusive nature of the way the class was created by the defendant hand-picking the plaintiffs and their lawyers. *Id.* These are problems unique to settlement classes. For a different settlement process in the asbestos litigation, see the lengthy litigation and settlement history involving the Manville Trust which assumed liability for all health-related claims arising out of Manville asbestos products. *In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764 (2d Cir. 1996) (court upheld the settlement of claims against Manville trust; litigation spanned a dozen years).

¹³⁸ 117 S. Ct. 2231, 2247-48 (1997).

¹³⁹ *Id.* at 2248. The Court noted that the Third Circuit had in fact considered the settlement in explaining why the class was improperly certified and that this “close inspection” of the settlement was proper. *Id.*

¹⁴⁰ *Id.* The Court seemed to refer to the proposed amendments to Rule 23 currently being considered by the Judicial Conference which would provide specifically for settlement classes. See *supra* note 132 and accompanying text.

dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness."¹⁴¹

After concluding that the settlement was a legitimate certification consideration, the Court proceeded to evaluate the class under Rule 23(b). First, the court held that the predominance requirement is not satisfied by a finding that claimants might gain from the establishment of a "grand-scale compensation scheme."¹⁴² Rather, the predominance inquiry tests whether proposed classes are "sufficiently cohesive to warrant adjudication by representation."¹⁴³ The predominance criterion demands more than a shared experience of common asbestos, or other product, exposure because of the wide disparity of injury experience of the present and future injury plaintiffs as well as the different products to which the class members were exposed.¹⁴⁴ The Court explained the predominance inquiry for mass tort cases:

Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that 'mass accident' cases are likely to present 'significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways.' And the Committee advised that such cases are 'ordinarily not appropriate' for class treatment. But the text of the rule does not categorically exclude mass tort cases from class certification, and district courts, since the late 1970s, have been certifying such cases in increasing number. The Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members great.¹⁴⁵

The Court, in conclusion, suggests important for future use of the class action, that "the rulemakers' prescriptions for class actions

¹⁴¹ 117 S. Ct. at 2248. The Court noted that considering the fairness alone of a proffered settlement prevents the court and the parties from using "the threat of litigation to press for a better offer, . . . and the court would face a bargain proffered for its approval without benefit of adversarial investigation." *Id.* at 2248-49. The Court implicitly is suggesting the continued importance of the liability class action.

¹⁴² *Id.* at 2249. The Court defined the predominance inquiry as trained on the legal or factual questions that give each class member a genuine controversy on which to build a settlement. *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2250.

¹⁴⁵ *Id.* (citations omitted). The Court concluded as well that the named parties could not fairly and adequately protect the interests of the class because of the conflicts of interest between them and the members of the class.

may be endangered by 'those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste.'"¹⁴⁶ The *Amchem Products* decision will affect all future class certifications.¹⁴⁷

C. The Courts of Appeal and Liability Classes Under Rule 23(b)(3)

Liability class action decertifications have come fairly quickly in recent years. After the upheld certifications in the school asbestos and Agent Orange cases, the courts of appeals became increasingly reluctant to certify liability class actions. It seems as if as soon as the courts of appeals upheld the certifications described above, trial court practice became too aggressive in certifying classes that appeared, to the more cautious appellate courts, to be only marginally appropriate for such treatment. While trial courts have taken the lead in class action certifications, a perceived excessive use of such actions may have contributed to the concerns addressed in the courts of appeals and which have lead to many recent decertifications. In any event, several of the courts of appeals opinions speak too categorically against the liability class action—an overreaction to the perceived abuses of the device.

An excellent example of the potential overuse and possible abuse of the class action device is presented in *In re American Medical Systems*,¹⁴⁸ decertifying a litigation class alleging defective penile prosthetics. The Sixth Circuit Court of Appeals, having a long history of dealing effectively with mass tort class actions and having certified them in the past,¹⁴⁹ decertified the class action primarily because it found that the "district judge's

¹⁴⁶ *Id.* at 2252 (quoting C. WRIGHT, THE LAW OF FEDERAL COURTS 508 (5th ed. 1994)).

¹⁴⁷ One of the earliest cases interpreting *Amchem Products* is a settlement class involving all tobacco plaintiffs who smoked cigarettes made by The Liggett Group, the one tobacco company willing to admit nicotine is addictive and willing to settle its claims. A settlement class was proposed for all such smokers and certification was sought in *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226 (S.D. W. Va. 1997). The court denied limited fund class certification, citing the millions of potential plaintiffs, and the near impossibility of obtaining adequate representation of the absent ones. *Id.* at 232.

¹⁴⁸ 75 F.3d 1069 (6th Cir. 1996) (concluding that trial court had not followed Rule 23 in every respect, including an impermissible shifting of the burden of proof to the defendants to disprove the class certification issue).

¹⁴⁹ See, e.g., *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) (defining standards for awarding mandamus on class certification decision); *Sterling v.*

disregard of class action procedures was of such severity and frequency”¹⁵⁰ as to render the certification suspect. The trial judge’s class certification analysis might best be described as a perfect example of what *not* to do. There was insufficient exploration of: (1) the named plaintiff’s adequacy to represent the class;¹⁵¹ (2) the general allegations of the complaint to determine if there were any particular issues which could predominate;¹⁵² and (3) the superiority requirement which had been given no analysis whatsoever.¹⁵³ The Sixth Circuit did not suggest that mass tort class actions were wholesale inappropriate, rather, it suggested that the district court’s failure of analysis was not permissible.¹⁵⁴ The trial court’s certification order was perfunctory, reflected no meaningful analysis, and is an example of the surface analysis which most defendants, and appellate judges, fear regarding the use of the class action.

An example of a court of appeals’ wholesale rejection of the mass tort class action can be found in *In re Rhone-Poulenc Rorer, Inc.*,¹⁵⁵ decertifying a limited liability issue class in cases involving hemophiliacs infected by HIV-infected blood. *In re Rhone-Poulenc Rorer* is one of the most important of the class action decertifications because of the sweeping language used to decertify an otherwise arguably fit class—limited in the number of plaintiffs and the number of defendants—and the influential posture of the author, Judge Richard Posner. Judge Posner’s opinion has become a powerful tool in the arsenal of the class action opponent, being heavily relied upon in *Castano v. The American*

Velsicol Chem. Co., 855 F.2d 1188 (6th Cir. 1988) (mass torts may be more efficiently and expeditiously adjudicated using class action).

¹⁵⁰ 75 F.3d. at 1074.

¹⁵¹ *Id.* at 1075. The plaintiff had diagnosed psychiatric problems including memory loss, impaired concentration, and lack of common sense, all of which arguably prevented him from adequately representing a class, potentially of thousands. *Id.*

¹⁵² *Id.* at 1080-81. AMS introduced evidence that there were at least ten models of the penile prosthesis and that they had changed over the years. *Id.* at 1081.

¹⁵³ *Id.* at 1084-85. The trial court refused to consider the Panel on Multidistrict Litigation’s refusal to consolidate the federal case, and its conclusion that consolidated treatment would not promote the efficient conduct of the litigation. *Id.* The trial court also failed to consider the differences in state law which might affect superiority. *Id.* at 1085.

¹⁵⁴ *Id.* at 1083-84 (discussion of possible amenability to class action of mass torts, but identifying trial court’s utter failure to follow the rule’s guidelines). In addition, the trial court seemed to place the burden of proof on the inappropriateness of class action treatment on the defendant, an improper approach. *Id.* at 1085-86.

¹⁵⁵ 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 18 (1995).

*Tobacco Co.*¹⁵⁶ and subsequent trial court decisions denying certification.¹⁵⁷

In *Rhone-Poulenc Rorer*, plaintiffs were thousands of hemophiliacs who received HIV-contaminated blood factors in transfusions from the late 1970s to 1984, before AIDS testing of the blood supply was widely available.¹⁵⁸ Plaintiffs claimed that the defendants, blood factoring companies, "dragged their heels" in screening donors and taking other measures to prevent contamination of blood solids by HIV after learning of the danger of infection.¹⁵⁹ The federal cases were consolidated for pretrial management and the trial judge certified a limited issue class under Rules 23(b)(3) and (c)(4) solely to determine liability.¹⁶⁰ If the defendants were found not liable on any proposed theory, the cases were over.¹⁶¹ If liability was found, individual plaintiffs would proceed back to their transferor courts for completion of the case on causation, damages, and individual defenses.¹⁶²

In granting the writ of mandamus¹⁶³ the court of appeals, through Judge Posner, identified a series of purported problems with the class certification in issue. At no time, however, did the court mention the requirements of Rule 23 or suggest that they were not met. Rather, a general negative predisposition toward class actions for mass torts is displayed early on in the opinion. For example, the court's initial description of the litigation points out that the defendants had won twelve of thirteen trials al-

¹⁵⁶ 84 F.3d 734, 748-9 (5th Cir. 1996) (regarding superiority).

¹⁵⁷ See, e.g., *In re Teletronics Pacing Systems, Inc.*, 168 F.R.D. 203, 208-10 (S.D. Ohio 1996) (relying on both *In re American Medical Systems* and *In re Rhone-Poulenc Rorer* in refusing to certify defective pacemaker leads litigation); but see *In re Copley Pharm. Inc.*, 161 F.R.D. 456 (D. Wyo. 1995) (certifying Albuterol litigation and rejecting *In re Rhone-Poulenc Rorer* focus on defendants' financial status).

¹⁵⁸ 51 F.3d at 1295. Plaintiffs presented that 2000 hemophiliacs had died of AIDS and that half or more of the 20,000 hemophiliac population could be contaminated with HIV. *Id.* at 1296. Several hundred cases were pending in state courts across the country and the federal cases had been consolidated in the Northern District of Illinois. *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1296-97. See also *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 169 F.R.D. 632, 633-35 (N.D. Ill. 1996) (case on remand, providing history of litigation).

¹⁶¹ 51 F.3d at 1297.

¹⁶² *Id.*

¹⁶³ *Id.* at 1293. On the standards used to decide whether mandamus should issue on the class action decertification issue, see *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) and *In re Am. Med. Sys. Litig.*, 75 F.3d 1069 (6th Cir. 1996).

ready,¹⁶⁴ suggesting that any contrary conclusion of the class trial would be an inconsistent, and indeed wrong, finding of liability. Neither the correctness of any prior verdicts nor the forecasting of the class trial's conclusion are appropriate considerations in the predominance or superiority inquiries,¹⁶⁵ and, in no event, does a "presumption" of the result on the merits, least of all a possibly successful outcome on liability, have anything to do with the class certification decision.¹⁶⁶ Further, the court focused on the variations in state law that affected predominance, but did not alone defeat it.¹⁶⁷

The opinion thereafter focuses primarily on the probable financial damage to the defendants if the class is certified, either because of an induced settlement or a finding of liability.¹⁶⁸ The class was comprised of 300 cases out of the possibly thousands of HIV-infected hemophiliacs in the country, and so a finding on the liability issue would only be effective as to those plaintiffs. The court suggests that a finding of liability would be "prima facie" as to defendants' liability in subsequent cases,¹⁶⁹ and as a practical matter this may be true but all other plaintiffs, as well as any opt-out plaintiffs, will be put to his or her proof. The court suggests that the potential, but speculative, effect of a liability determination on future litigation will induce the defendants to settle.¹⁷⁰ But there will be many opt out plaintiffs whose cases

¹⁶⁴ 51 F.3d at 1296. The court pointed out that only 40% of the cases had thus far been filed in federal court under diversity jurisdiction. *Id.*

¹⁶⁵ The assumption that class action juries would necessarily find liability against defendants is inconsistent with recent data suggesting that defendants win more jury trials than plaintiffs in product liability cases. Theodore Eisenberg & James A. Henderson, Jr., *The Quiet Revolution in Product Liability*, 39 UCLA L. REV. 731 (1992). In fact, if there is any prejudice today regarding such cases, it likely would come from those who believe that class plaintiffs generally are undeserving and pressing unmeritorious claims for the money. Paul D. Rheingold, *Recent Setbacks for Class Actions*, Products Liability Advisory at 5 (Aug. 1996) (mass tort plaintiffs lawyers collect large inventories of small, questionable cases through advertising).

¹⁶⁶ See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (merits of the class action are irrelevant in determining certification).

¹⁶⁷ 51 F.3d at 1296.

¹⁶⁸ *Id.* at 1297-98.

¹⁶⁹ *Id.* at 1298. Offensive collateral estoppel is rarely invoked and even more rarely allowed. See also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (setting limits on use of offensive collateral estoppel).

¹⁷⁰ 51 F.3d at 1298. The court acknowledges that defendants will have various defenses that may or may not prevail, and that "[t]hey may not wish to roll these dice." *Id.* The court found compelling:

a concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy

will proceed anew and who will have to prove liability without the benefit of the prior finding¹⁷¹ as well as entirely new cases that will start from scratch.

In fact, if all prior mass tort cases stand for anything, they stand for the proposition that most product liability defendants have significantly more resources, as well as wherewithal, to fight the cases individually and that it is just as likely that they will fight after a class determination of liability, as it is that they will settle, even in the face of that significant prior loss. One need only look to asbestos and Dalkon Shield litigation for this conclusion. That is why defendants fight class actions—they would much rather have the chance to fight each case, with little regard for the excessive transaction costs involved, than to chance losing even one case, especially one that will substantially prevent the opportunity to fight again another day. In addition, all cases present the potential that a liability determination will affect future cases; all products liability defendants who have mass-marketed a product fear that one finding of liability will affect the future of the product on the market and in competition with other products. But not all products liability cases are settled as a result of this pressure.

The pressure to settle and the financial burden on the defendants masks the court's ultimate concern: "[o]ne jury, consisting of six persons . . . will hold the fate of an industry in the palm of its hand."¹⁷² As has been widely true in recent years regarding the alleged "litigation crisis" and alleged "runaway jury verdicts," this observation reflects personal and political opinion but is not realistic. While it is true that many class actions settle, and that therefore the courts must be attentive to the prerequisites before

to settle even if they have no legal liability, when it is entirely feasible to allow a final, authoritative determination of their liability for the colossal misfortune that has befallen the hemophiliac population to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions; and when, in addition, *the preliminary indications are that the defendants are not liable for the grievous harm that has befallen the members of the class.*

Id. at 1299 (emphasis added). One commentator has suggested that Judge Posner was protecting the defendants from themselves by alleviating the temptation to settle the cases. Paul D. Rheingold, *supra* note 165, at 5.

¹⁷¹ See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). On offensive collateral estoppel generally, see Michael G. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141 (1984).

¹⁷² 51 F.3d at 1300.

certification, the likelihood of settlement is nowhere suggested to be a reason for refusing certification.¹⁷³ Indeed, recent studies show that class actions certified on liability are no more likely to settle than other civil actions, the rate of both being very high.¹⁷⁴

Further, the idea that defendants are somehow entitled to try every case on an individualized basis is totally inconsistent with the very existence of Rule 23, not to mention its specific requirements. In many instances individualized adjudication is preferred, and indeed in many cases it is the plaintiffs who object to class actions¹⁷⁵ because of the fear that recovery will be greatly diminished if received en masse. But the point that most courts and commentators seem to be missing is that what the parties obtain when valid classes¹⁷⁶ are decertified is exactly what the Rule seeks to avoid—excessive transaction costs (in which predominantly the attorneys win) as a result of the relitigation of exactly the same liability issues, leading to inconsistent verdicts, and inconsistent, delayed, or denied justice. Well-resourced institutional defendants are much more likely to succeed in individual cases for a number of non-substantive reasons—differences in quality of plaintiffs and defense counsel, success of discovery and pre-trial strategies that evolve over time unrelated to the merits, different assessments of the same evidence by different jury pools,¹⁷⁷ and countless others. The merits of the case will cer-

¹⁷³ See *id.* at 1305 (Rovner, J., dissenting). Interestingly, the parties continued to seek settlement of the contaminated blood cases and as late as December 1997, a settlement was still pending to seek to resolve the cases en masse. The district court on remand certified a settlement class. See *In re Factor VIII or IX Concentrate Blood Prod. Litig.*, 169 F.R.D. 632, 634 (N.D. Ill. 1996) (case on remand from *Rhone-Poulenc Rorer*; describes pending settlement, and defendants effort to call 137 common-issue expert witnesses at subsequent trials if settlement fails). One can only wonder what Judge Posner must think of this capitulation by the defendants to the pressure to settle.

¹⁷⁴ See EMPIRICAL STUDY, *supra* note 31.

¹⁷⁵ See *Georgine v. Amchem Prod.*, 83 F.3d 610 (3d Cir. 1996). It is interesting that many defendants try to avail themselves of the class action device to reduce, not increase, their liability. See also *In re Joint E. & S. Dist. Asbestos Litig.*, 14 F.3d 726 (2d Cir. 1993) (manufacturer sought settlement class; court refused to allow manufacturer to evade bankruptcy system by use of class); *In re N. Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982) (plaintiffs sought and obtained decertification of class on punitive damages).

¹⁷⁶ See *supra* Part IV for definition of valid class.

¹⁷⁷ An additional reason given in *Rhone-Poulenc Rorer* for decertification is the possible infringement of the defendants' Seventh Amendment jury trial right. 51 F.3d at 1302. While this suggestion has been made by others in opposition to class actions, a full treatment of it is beyond the scope of this article. It is interesting to note that the court does not rely on it alone, when one would think infringement of a

tainly also affect success, but whether liability exists or not is a truth, like other truths, on which no one has a monopoly.

The national tobacco addiction class involved in *Castano v. The American Tobacco Company*¹⁷⁸ was, at the time, very unlikely to become a settlement class, though we now know that the tobacco companies are seeking to settle all tobacco-related liability with congressional immunity as one of the terms of a broad-based settlement agreement with states and some state class actions. While there is pressure in all cases to reach a settlement, the tobacco industry until very recently gave the perception that it would truly rather fight than switch.

A group of well-funded plaintiffs' lawyers, the Tobacco Plaintiffs' Legal Committee,¹⁷⁹ combined to pursue an action against the tobacco industry after the Supreme Court issued *Cipollone v. Liggett Group, Inc.*,¹⁸⁰ the decision defining the scope of federal preemption of state law-based causes of action under the federal cigarette labeling laws. The result was a class action complaint filed in May 1993 in *Castano v. The American Tobacco Co.*¹⁸¹ in the Federal District Court for the Eastern District of Louisiana and tailored specifically to withstand the preemption defense. The class was composed not of persons who have suffered cancer or other smoking-related illness, but of all those smokers who were nicotine-dependent and who claim the tobacco industry fraudulently induced their smoking habit by withholding information about the addictiveness of nicotine.¹⁸² Plaintiffs sought primarily a limited issue class under Rules 23(b)(3) and 23(c)(4) on the core issues of liability based on the defendants' misrepresentations in the advertising and marketing of cigarettes without

right to jury trial would be a better reason to decertify than the possibility of settlement. Also, the suggestion that the defendants have a right to have only a jury decide issues of fact seems inconsistent with the court's earlier point that the defendants are protected when many juries have an opportunity to decide the same issue. On the Seventh Amendment issue in class actions, see Coffee, *supra* note 4, at 1440.

¹⁷⁸ 84 F.3d 734 (5th Cir. 1996).

¹⁷⁹ Mark Curriden, *Hurdle Cleared for Tobacco Suit: With Class Action OK, Plaintiffs' Lawyers Promise Massive Effort, Cooperation*, 81 A.B.A.J., May 1995, at 22-3.

¹⁸⁰ 505 U.S. 504 (1992).

¹⁸¹ 160 F.R.D. 544 (E.D. La. 1995) (class certification decision), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

¹⁸² *Id.* at 548. Plaintiffs pursued causes of action for fraud and deceit, negligent misrepresentation, intentional and negligent infliction of emotional distress, breach of express and implied warranties, violation of state consumer protection statutes. *Id.*

informing of the likelihood of nicotine-dependence from smoking.¹⁸³

Defendants vigorously opposed class certification. One must remember that tobacco litigation has historically been one of the most hotly contested, contentious pieces of litigation known. Since 1954, more than 300 lawsuits have been filed and the cigarette companies were, until very recently, proud of never having paid a dime in settlement or jury award.¹⁸⁴ Tales of the discovery battles between plaintiffs and defendants in the personal injury cases are the stuff of which legal legends are made.¹⁸⁵ The *Castano* class was not likely to be anything other than a liability class.

The district court certified the class, though in a significantly more limited way than had been requested. The court refused to certify those issues that seemed to require individual determinations of causation and damage, as had been done in *Jenkins*.¹⁸⁶ The court found that the class met all the Rule 23(a) prerequisites of numerosity, commonality,¹⁸⁷ typicality, and adequacy of representation.¹⁸⁸ In dealing with Rule 23(b)(3)'s requirements

¹⁸³ *Id.* at 549, 553-54. Plaintiffs also sought certification under Rule 23(b)(2) for a medical monitoring fund to be established to monitor plaintiffs for tobacco-related health problems. The trial court refused to certify this issue as it involves not primarily equitable relief but damages. *Id.* at 551-52.

¹⁸⁴ See OWEN ET AL., *PRODUCTS LIABILITY & SAFETY* at 976-77 (3d ed. 1996). The Liggett Group soon broke ranks with the industry and arranged a settlement with the class action plaintiffs before certification was reversed. Barnaby J. Feder, *Industry Split By major Deal in Tobacco Suit: Liggett Agrees to Settle Class-Action Lawsuit*, N.Y. TIMES, Mar. 14, 1996, at A1. In addition, now that over 20 states have sued the tobacco industry seeking reimbursement for Medicaid costs for those suffering tobacco-related illnesses, the tobacco industry has entered into an historic massive settlement of those claims. Prod. Liab. Rep. (CCH) No. 878 at 1 (Feb. 21, 1997). See also Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992). On the smoking and health issues in society generally, see SMOKING POLICY: LAW, POLITICS AND CULTURE (R. Rabin & R. Sugarman, eds., 1993).

¹⁸⁵ Recent books on the litigation are a testament to the good story that the tobacco litigation makes. See PHILIP J. HILTS, *SMOKESCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP* (1996); STANTON A. GLANTZ ET AL. *THE CIGARETTE PAPERS* (1996).

¹⁸⁶ *Jenkins v. Raymark Industries*, 782 F.2d 468, 473 (5th Cir. 1986).

¹⁸⁷ "The threshold of commonality is not high." *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 550 (E.D. La. 1995), *rev'd*, 84 F.3d (5th Cir. 1996). The commonality issue is inextricably mixed with the predominance and superiority issues in Rule 23(b)(3) and the court deferred its discussion of the issue to that stage of the analysis.

¹⁸⁸ *Id.* at 550-51. As in most class actions, the Rule 23(a) requirements are not likely to be difficult to meet, though recall that in some of the settlement classes

of predominance and superiority, the court applied the test from *Jenkins*, that common issues must constitute "a significant part of the individual cases,"¹⁸⁹ and found that the core issues of fact regarding "whether the defendants knew cigarette smoking was addictive, failed to inform cigarette smokers of such and took actions to addict cigarette smokers"¹⁹⁰ predominated. The court also found that core legal issues of liability predominated in that the defendants' behavior did not change as to each individual plaintiff. Rather, the defendants' behavior reflected a course of conduct directed toward society and the class of smokers, and, therefore, was proper for resolution, but that individual issues of causation, damages, and affirmative defenses were not.¹⁹¹ The court also concluded that, given the huge number of cases that could swamp the courts for years, the class action was clearly superior to individual case adjudication given "the specter of thousands, if not millions, of similar trials of liability proceeding in thousands of courtrooms around the nation."¹⁹²

The Fifth Circuit Court of Appeals decertified the class.¹⁹³ The errors found were: (1) the trial court did not properly evaluate the variations in state law to justify its finding of predominance under Rule 23(b)(3); (2) the trial court did not properly assess the manageability issues under its superiority analysis under Rule 23(b)(3); and (3) the class independently fails the superiority requirement as a method of resolving the litigation.¹⁹⁴ The case serves as a bookend to the class action litigation over

discussed, the courts have been very concerned with the adequacy of representation requirement. *See, e.g., In re General Motors Corp. Pickup Truck Fuel Tank Liability Litigation*, 55 F.3d 768, 786-90 (3d Cir. 1995), *aff'd*, 134 F.3d 133 (3d Cir. 1998).

¹⁸⁹ *Castano*, 160 F.R.D. at 553 (quoting *Jenkins*, 781 F.2d at 472).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 553, 556-57. The court responded to defendants' concern that individual reliance issues would predominate in the misrepresentation-based counts by suggesting that (1) the court was not to focus on the merits in deciding certification, and (2) that a presumption of reliance might be available and that, in any event, that applicable law was not so various that individual issues predominated on the core liability issues. *Id.* at 554-55. The court could subdivide the class based on the applicable law once it had been determined. *Id.* at 554.

In addition, the court certified the class as to punitive damages. *Id.* at 558. To aid in the management of the class, the court narrowed the definition of class members. *Id.* at 559.

¹⁹² *Id.* at 555-56. Recognizing the importance of the decision to certify, the district court granted the defendants' motion for an interlocutory appeal. *Castano v. American Tobacco Co.*, 162 F.R.D. 112 (E.D. La. 1995).

¹⁹³ *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

¹⁹⁴ *Id.* at 740-41.

the previous twenty years, resurrecting, as did the court in *In re Rhone-Poulenc Rorer*, the underlying primary barrier to class action certification in the mass tort cases—the dogged dedication to the individual case-by-case adjudication model as the only means of securing fair, efficient case resolution. Despite the defendants' common course of conduct toward society and the denial of access to the judicial system of a significant portion of the injured population, the court adhered to the rigid individualized adjudication model.

The court of appeals focussed initially, as did the court in *In re Rhone-Poulenc Rorer*, on the variations in state law that would “swamp any common issues and defeat predominance.”¹⁹⁵ The court seemed at first to be concerned with the trial court's failure to explore more fully the nature of the differences between fraud and the other causes of action among the possibly relevant jurisdictions.¹⁹⁶ Upon closer inspection, the court moved from requiring a “consideration of variations” to a requirement that a court must “know which law will apply” before making a predominance determination.¹⁹⁷ This is not the proper standard; the court cites as authority for the proposition only *In re Rhone-Poulenc Rorer*.¹⁹⁸

Variations in the applicable law must of course be considered seriously and it may be that the district court's analysis was less than adequate.¹⁹⁹ But the court of appeals' requirement that a choice of law decision be made in order to make the certification decision is a much more rigorous standard than either *Jenkins* or other cases have required.²⁰⁰ The district court appeared to have studiously considered the variations in fraud and misrepresentation and it is unclear from its opinion what plaintiffs presented in the way of thorough explanation of the variations.²⁰¹ The court of appeals observed that the defendants' analysis was “extensive” and that the plaintiffs failed to discuss how the court could deal with variations—not what the variations were and whether they

¹⁹⁵ *Castano*, 84 F.3d at 741.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ This seems unlikely given the nature of the lawyers in the tobacco litigation, having battled for decades and not given to underpreparation.

²⁰⁰ *Castano*, 84 F.3d at 742. See also *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986).

²⁰¹ *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 554-55 (E.D. La. 1995), *rev'd*, 84 F.3d (5th Cir. 1996).

predominated, but how they could be handled.²⁰² The court of appeals was now confusing the predominance issue—are there common issues which predominate?—with whether such common issues could be adequately handled—manageability—under the superiority analysis. It is increasingly unclear what the court of appeals would find sufficient on the issue, and indeed, one has the impression that there is no such thing.²⁰³ More to the point, though, is the lack of clarity of the court of appeals' analysis, mixing the Rule 23(b)(3) factors and confusing the reader with elements for consideration that seem internally inconsistent.

The district court's failure to analyze extensively the variations in state law could arguably have been cured and the case certified subsequently after the errors corrected. But the court would have the final word on the matter by finding that the class independently failed the Rule's superiority requirement even if the district court's analysis otherwise had been perfect. The court stated:

In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.²⁰⁴

The court identifies two failings in the district court's superiority analysis: the reliance on a perceived judicial crisis in tobacco liti-

²⁰² 83 F.3d at 742-43.

²⁰³ The court continues to discuss the superiority issue under the guise of predominance by creating an additional predominance inquiry that the court "failed to consider how the plaintiffs' addiction claims would be tried, individually or on a class basis." *Id.* at 744. This additional predominance requirement seems to relate more to superiority and not to predominance. It becomes clear, in the last section of the court's opinion, that the ultimate point is that no one has ever tried a fraud claim against the tobacco companies so no one can know whether common issues predominate. This requirement, of course, means that no case can be certified as a class action unless some virtually identical case involving that defendant has been tried before. It is absurd to suggest that fraud cases are somehow special just because the injury is fraudulently induced addiction to tobacco.

²⁰⁴ *Id.* at 746 (citation omitted).

gation which may not materialize²⁰⁵ and the immaturity of the cases.²⁰⁶

In response to these two criticisms, there is no requirement in Rule 23(b) that a judicial crisis the likes of asbestos litigation must be the paradigm crisis by which all class action situations are judged. Here again is the danger from treating all class action mass torts like asbestos cases. There is, indeed, no requirement in Rule 23 that there be *any* judicial crisis, just that in the particular case, the adjudication of the cases by class action is superior to available alternatives. It is not as if there have been no individual cases—there has been forty years of tobacco litigation of one sort or another. Given the contentiousness with which tobacco companies fight all cases involving the detrimental health effects of tobacco, only a handful of cases have proceeded to trial because the tobacco companies are so good at defending themselves against any and all attacks. This track record of defendants' success, for both meritorious and unmeritorious reasons, should not be the death knell for a class action where it is otherwise appropriate under the rules. The trial court's reliance on a judicial crisis in tobacco litigation was not a necessary finding on which superiority could have been based.²⁰⁷ Rather, the nature of the claims, not involving extensive, high value personal injury but rather smaller value claims based on a need to quit smoking, are much closer to the small value consumer cases the rule was specifically intended to reach.

²⁰⁵ *Id.* at 747. Interestingly, the court talks at length in a footnote about the judiciary's ability to act as a gatekeeper in mass tort cases to prevent judicial meltdown, assuming sub silentio that the tens of thousands of tobacco plaintiffs in the class would not actually pursue individual claims. *Id.* nn.24, 25. The unlikelihood of individual claimants pressing individual claims is one of the reasons class action treatment is often considered superior.

²⁰⁶ *Id.* at 748 (relying on *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995)).

²⁰⁷ The plaintiffs, after decertification, filed several class action lawsuits in states across the country, making good on a threat spoken at the court of appeals to do just that. The judicial crisis to which the district court referred, therefore, came true partially as a result of the decertification. Two of those cases, filed in state courts, were removed to federal court, and were once again refused certification. See *Arch v. The American Tobacco Co.*, 175 F.R.D. 469, 486 (E.D. Pa. 1997) (Pennsylvania plaintiffs present addiction-as-injury claims against all tobacco companies; court found requirements of Rule 23(a) satisfied but that predominance was not satisfied because it is "contrary to the weight of authority in mass tort cases"); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997) (Missouri smokers sue B&W alone; predominance not satisfied because variations in substantive law and individual causation issues control).

Regarding the immaturity of the claims, this criticism of the superiority of the class action has been widely made and widely misunderstood. In the context of cases where the claims are scientifically immature in that the evidence, for example, of general causation is lacking or in its infancy, the certification of a class may indeed be immature. The Bendectin litigation is a good example of a case where general causation was uncertain, and the Sixth Circuit Court of Appeals decertified that class partially as a result.²⁰⁸ The *Castano* court misplaces its reliance on the immaturity aspect of the addiction-as-injury claims. In the first place, the maturity issue is raised most often in circumstances where the *injury* is incapable of valuation because of the lack of a track record to place a value on nascent claims. That absence of value may have an affect on settlement negotiations, but is just as likely to help defendants as to hurt them. Maturity relates more fundamentally to the nature of the product in the market or the scientific proof of the causal connection, even perhaps the novelty of the underlying claim.²⁰⁹ Here, there is nothing novel about fraud or misrepresentation or breach of warranty. There is nothing new under the sun about defendants withholding damaging information from consumers—that is indeed the entire basis for much of products liability.

Since the overwhelmingly negative opinions in *In re Rhone-Poulenc Rorer* and *Castano*, several of the remaining circuit courts of appeal have explored the propriety of the mass tort liability class action. *In re American Medical Systems, Inc.*²¹⁰ postdated *In re Rhone-Poulenc Rorer* and was, for the most part, receptive of the mass tort class action, but not the cursorily analyzed class involved there. In *Valentino v. Carter-Wallace, Inc.*,²¹¹ the Ninth Circuit Court of Appeals had occasion, for one of the first times since its class decertification in the Dalkon Shield litigation over a decade ago, to discuss the propriety of the mass tort class action. The plaintiffs were epilepsy sufferers who acquired aplastic anemia as one of the side effects of using the de-

²⁰⁸ See *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984).

²⁰⁹ The court cites the MANUAL FOR COMPLEX LITIGATION for the proposition that immature torts may not be appropriate for class treatment. *Castano*, 84 F.3d at 749. The important part of the reference to immature claims is that the immaturity involves new products or pharmaceuticals, not *new* injuries. There is nothing new about cigarettes or addiction.

²¹⁰ 75 F.3d 1069 (6th Cir. 1996); see discussion *supra* note 149 and accompanying text.

²¹¹ 97 F.3d 1227 (9th Cir. 1996).

fendants epilepsy drug, Felbatol.²¹² During the less than two years the drug was marketed, it was used by over 100,000 patients.²¹³ The trial court certified the common issues of strict liability, negligence, failure to warn, breach of warranty, causation in fact, and punitive damages.²¹⁴ The defendant, based on the fifteen-year-old *Dalkon Shield* class action opinion, argued that regardless of specific problems with this particular certification, class certification is never appropriate for multi-state plaintiffs asserting personal injury claims against manufacturers of drugs and medical devices.²¹⁵ The court of appeals thus had occasion to revisit *Dalkon Shield*, which had been so critical of mass tort class actions, in light of the recent pronouncements of sister courts of appeals.

In a telling observation, the court of appeals began with the comment that “[t]he history of class action certifications and products liability cases in this circuit and elsewhere has not been luminous.”²¹⁶ The court explained its *Dalkon Shield* opinion, in part, as a result of there being no plaintiff prepared to represent the class nor any attorney prepared to take charge of the case.²¹⁷ The court acknowledged that *Dalkon Shield* was careful not to preclude the future certification of more limited classes or subclasses pursuant to Rule 23(b)(3)²¹⁸ and proceeded to review the cases from other circuits which had more recently evaluated the mass tort class action.

The court, after reviewing the Agent Orange and school asbestos opinions and noting that those certifications dealt with limited issues and harms and, thus, were considered more

²¹² *Id.* at 1228. Two defendants manufactured the drug, one was a subsidiary of the other. The drug was marketed in 1993 with no warning of the side effects; in early 1994 the defendant had received reports of the side effects of aplastic anemia and liver failure. The defendants mailed letters with this information to prescribing physicians in August and September of 1994. *Id.* at 1228-29.

²¹³ *Id.* at 1229.

²¹⁴ *Id.*

²¹⁵ *Id.* at 1230. The defendants relied on *Castano*, *In re Rhone-Poulenc Rorer*, and *In re American Medical Systems*. *Id.*

²¹⁶ *Id.* The court also explained that most courts have proceeded on a case-by-case basis and considered the particular circumstances. *Id.* This point is subject to some debate, however.

²¹⁷ *Id.* at 1231. The court noted that *Dalkon Shield* left the door open for future more limited class certifications, and stated “we cannot conclude that *Dalkon Shield* creates an absolute bar to such certification in this circuit.” *Id.*

²¹⁸ *Id.*

manageable,²¹⁹ proceeded to evaluate *In re Rhone-Poulenc Rorer*.²²⁰ The court identified the three concerns expressed in *In re Rhone-Poulenc Rorer*: the general distaste for placing defendants' financial health in the hands of a single jury, the variations in state liability laws which would be difficult to overcome in class format, and the potential infringement of the Seventh Amendment.²²¹ The Ninth Circuit Court of Appeals quickly and tersely treated the central concern regarding the institutional defendants fiscal health by observing that such a disguised concern for the merits was inconsistent with the Supreme Court's class action jurisprudence rejecting any preliminary determination of the merits of the litigation.²²²

The court ultimately embraced the proposition that class action litigation in products liability cases ought not to be foreclosed, particularly given developments to make class litigation more manageable.²²³ The court proceeded to review the trial court's certification decision.²²⁴ Because the trial court's analysis was brief and conclusory as to even the Rule 23(a) requirements of typicality and adequacy of representation of the named plaintiffs, the court concluded that the class must be vacated and remanded.²²⁵ As to the often-debated requirements of Rule

²¹⁹ *Id.* at 1231-32.

²²⁰ *Id.* at 1232.

²²¹ *Id.* As to the Seventh Amendment issue, the court of appeals observed simply that the constitutional concern of the *Rhone-Poulenc Rorer* court may not be fully in line with the law of the Ninth Circuit as well as not presented to the district court in that case. *Id.*

²²² *Id.* In addition, the court of appeals stated that the concern was not in line with the law of the Ninth Circuit.

²²³ *Id.* at 1233 (citing several proposals to amend class action procedures such as the possible amendment to Rule 23 pending in the Judicial Conference).

²²⁴ *Id.* The court of appeals adopted the Sixth Circuit's position in *American Medical Systems*, 75 F.3d 1069 (6th Cir. 1996), which had suggested that district courts must conduct a rigorous analysis into whether the Rule's prerequisites had been met. 97 F.3d at 1233.

For a recent Sixth Circuit decision dealing with the problem of attorneys fees generated in mass tort class actions, see *Bowling v. Pfizer, Inc.* 102 F.3d 777 (6th Cir. 1996) (defective heart valve implant litigation settled worldwide in 1992; fee-sharing arrangements sought in discovery, court upheld their nondisclosure). See also *In re San Juan DuPont Plaza Hotel Fire Litigation*, 111 F.3d 220 (1st Cir. 1997) (district court order of \$10 million in fees upheld in class action arising from 1986 hotel fire; lengthy discussion of fee evaluation process).

²²⁵ 97 F.3d at 1234. The court noted that no named plaintiff had the aplastic anemia condition which the drug allegedly causes. *Id.* The court observed that notice may be problematic because the number of users who may suffer the side effects may not yet be fully known. *Id.*

23(b)(3), predominance and superiority, the court concluded that “even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues.”²²⁶ The court of appeals was concerned that the district court had done a less than thorough evaluation of the Rule’s requirements and remanded for a fuller review under a “rigorous analysis.”²²⁷

D. Trial Court Decisions in the Post-Modern Era

As has been mentioned, trial courts were instrumental in increasing the use of the mass tort class action because if it were not for the courage and resourcefulness of the trial judges who certified the early asbestos and Agent Orange classes, there would be no appellate opinions to explore the mass tort class action. Judges Robert Parker in the asbestos cases and Jack Weinstein in the Agent Orange and asbestos cases are two of the judges whose contribution is truly legendary. In the aftermath of the recent appellate opinions denouncing the use of the mass tort class action, many trial judges appear timid to use that device, even in the face of its otherwise appropriateness.

The tobacco cases for which class certification was sought after *Castano* are a case in chief. As promised, plaintiffs filed several state class actions after the *Castano* decertification.²²⁸ In the first of those to reach a certification decision, the defendants, having removed the case to federal court, no doubt to take advantage of the increasingly favorable federal law on class actions, argued that a class action involving plaintiffs from only one state still did not involve common issues which predominated and class certifi-

²²⁶ *Id.* The trial court had done only a cursory evaluation of the predominance or superiority aspect of the Rule. In *Baxter Healthcare Corp. v. United States District Court No. 96-70243*, 1997 U.S. App. LEXIS 21047 (9th Cir. Aug. 5, 1997), the court of appeals denied a writ of mandamus to overturn a class certification in medical device litigation and noted that the trial judge in *Baxter* had done a significantly more thorough predominance and superiority evaluation though it may need to be modified in light of *Valentino*.

²²⁷ *Valentino*, 97 F.3d at 1233-35.

²²⁸ *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (plaintiffs counsel, at oral argument, identified their plan to file state class actions in virtually every state to substantiate the judicial crisis about to occur). See also DAVID G. OWEN, ET AL. *PRODUCTS LIABILITY AND SAFETY* 1055 (3d ed. 1996) (discussing *Castano* and tobacco litigation generally). For a discussion of *Castano*, see *supra* Part II.A., note 179 and accompanying text.

cation remained inferior to individualized adjudication.²²⁹ The trial court, relying on *Castano* and *Georgine*, said categorically that plaintiffs' request under Rule 23(b)(3) is "contrary to the weight of authority in mass tort cases."²³⁰ The court spoke very broadly in terms of the overall inappropriateness of mass tort class actions, relying on the asbestos cases and on *Castano*'s concern for immaturity²³¹ and lack of superiority, even though there was only one state's law to apply and even though the plaintiffs had suggested issue certification on liability alone.

The trial court was sidetracked by its view that individual issues of addiction and causation were predominant, even though the plaintiffs ultimately only sought a class on liability and punitive damages.²³² Further, the trial court concluded that the "major rationale" for finding superiority—judicial efficiency—was not present because it was only speculative that there would be redundant litigation of issues of liability.²³³ Further, the court refused to use Rule 23(c)(4) to certify a limited issue class, relying on *Castano*'s reluctance to do so because, it held, the entire class must be appropriate for certification and only then Rule 23(c)(4) may be used as a housekeeping rule.²³⁴ As will be seen, this reading of Rule 23(c)(4) is unnecessarily restrictive, and one based on the premise that mass tort class actions are simply not amenable to class certification in any manner. This fundamental prejudice against the mass tort class action prevents an objective analysis of Rule 23.

The next tobacco class action, *Smith v. Brown & Williamson*

²²⁹ Arch v. The American Tobacco Co., 175 F.R.D. 469, 474 (E.D. Pa. 1997). The defendants fought all prerequisites of Rule 23 certification; the primary focus of the court's opinion was on predominance and superiority under Rule 23(b)(3). *Id.* at 485.

²³⁰ *Id.* at 486.

²³¹ *Id.* at 495 n.27 (trial judge suggested that the immature tort theory prevents a finding of superiority but rejected the *Castano* court's reading of all such torts as not certifiable).

²³² *Id.* at 487-89. Plaintiffs often seek limited issue certification in the alternative to entire case certification. This tactical error may cause trial judges simply to ignore the value of limited issue certification on liability alone.

²³³ *Id.* at 495. The court speculated that the trials might not be fought on liability but only on individual issues of causation. *Id.* The court suggested that "a prior track record" was necessary before an accurate determination as to judicial efficiency could be made. *Id.* The spectre of *Rhone-Poulenc Rorer* persists here in that such a determination requires some evaluation of the merits, specifically prohibited by the Supreme Court's *Eisen* opinion. One wonders how many individual trials are necessary to constitute a track record.

²³⁴ *Id.* at 496.

Tobacco Corp.,²³⁵ involved plaintiffs of the same state, Missouri, and a single defendant. The plaintiffs sought certification of only liability-related issues, leaving the individual issues of causation and defenses to individual trials, or sub-trials.²³⁶ The court noted that it was not appropriate to grant or deny class certification based “simply on the truth or falsity of whether mass tort cases are amenable to certification.”²³⁷ The court advocated a more context-based approach, consistent with the thesis of this article, yet in application it was reluctant to proceed with the result of its analysis, that a class action was appropriate. The court agreed that commonality was present, but only in a general sense and that somehow general commonality was insufficient.²³⁸ Further, the court relied on the concerns about variations in state law, though there would be only one state’s law to apply since the class was limited to plaintiffs from one state and the applicable choice of law rules strongly suggest the choice of the plaintiffs home state.²³⁹ Federal judges in the 1990s appear so intimidated by the mass tort class action that they reject rational, thoughtful choice of law analysis for blanket assumptions.

While there are a variety of issues in the tobacco cases that might mitigate against class certification—for example, reasonable minds might differ on how to handle an exceptionally large number of claimants in combination with an extraordinarily powerful group of defendants—non-tobacco cases are also being routinely denied certification in all circuits. In the Fifth Circuit, one trial court, citing *Castano*, recently denied certification to a liability class action that sought resolution of what appears a classic

²³⁵ 174 F.R.D. 90 (W.D. Mo. 1997).

²³⁶ *Id.* at 93.

²³⁷ *Id.* at 94. The court agreed with the *Valentino* court in its observation on this point. *Id.* at 94 n.5.

²³⁸ *Id.* at 94. The court conclusively stated that because there were individual issues, there must necessarily be a lack of predominance. *Id.*

²³⁹ *Id.* at 94-95. The court proceeds to butcher the choice of law principles to conclude that Missouri law did not necessarily control. *Id.* at 95-96. The variations in state law have been so overstated that federal courts sitting in diversity are too timid to make thoughtful choice of law decisions. The most frequently used choice of law theory, the Restatement of Conflict of Laws (Second), applicable to tort actions applies a “most significant relationship” test to determine choice of law issues. In § 146 of that Restatement, there is a presumption that all other factors being equal, the place of the injury should control. The place of addiction as injury is, not surprisingly, where the addicted person resides. For the plaintiffs in *Smith*, that would arguably be in Missouri. See RESTATEMENT (SECOND) OF CONFLICTS §§ 145, 146 (1966). The choice of law issues are further discussed *infra* notes 285-302 and accompanying text.

example of an appropriate mass tort class: property damage claims of fairly small value arising out of defective house siding manufactured by only one defendant.²⁴⁰ The court held simply that *Castano* stated that federal courts should not certify cases that arise under state law, nor should they certify "novel" cases.²⁴¹ Similarly, a class was denied to users of the Norplant contraceptive device specifically based on *Castano*'s statement that generally immature claims are not certifiable because individual trials are necessary to make informed decisions about commonality and predominance.²⁴² Such a conclusion may indeed be appropriate in a particular case, even in relation to newly used and tested medical devices, but the failure of analysis and subsequent blanket rejection of the class action based on the assumption that "newness" of claims equals inappropriateness of certification exalts not only form, but judicial fear, over substance.

In the Fourth Circuit, where the asbestos school property class certification took place and where Dalkon Shield-related litigation was certified,²⁴³ one court chose to rely on *In re Rhone-Poulenc Rorer* to deny certification to a property damage case arising out of defective home exterior finishes made by a group of sixteen defendants.²⁴⁴ Rather than rely on *Central Wesleyan College v. Grace*,²⁴⁵ the school asbestos property damage class certification opinion from its own circuit, the trial court chose to read that opinion simply as "a cautious affirmance of the trial court's decision under the abuse of discretion standard,"²⁴⁶ and not an endorsement, under substantially similar circumstances, of the mass tort class action. The trial court allowed itself to be swamped by state law variations and to fear "the devil in the de-

²⁴⁰ See *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 426-427 (E.D. La. 1997).

²⁴¹ *Id.* at 421. The court rejected the action even though certification had been upheld in many "negative-value" property damage suits like this one which prevent individuals from suing independently. *Id.*

²⁴² *In re Norplant Contraceptive Prods. Liab. Litig.*, 168 F.R.D. 577 (E.D. Tex. 1996).

²⁴³ For a discussion of these cases, see *supra* note 30 and accompanying text.

²⁴⁴ *In re Stucco Litig.*, 175 F.R.D. 210 (E.D.N.C. 1997). The allegedly defective exterior finish caused water to seep in, the homes to rot, insect infestation, and structural damage. *Id.* at 212.

²⁴⁵ 6 F.3d 177 (4th Cir. 1993).

²⁴⁶ *Stucco Litig.*, 175 F.R.D. at 213. The court relied on the immaturity of the litigation even though there is nothing new about property damage cases. *Id.* at 218.

tails”²⁴⁷ as expressed by the court in *In re Rhone-Poulenc Rorer*.

The trial courts in the Sixth Circuit, having certified some class actions in mass tort cases since the early 1980s,²⁴⁸ have shown reluctance to certify them in recent cases in the face of *In re American Medical Systems*, which criticized the certification analysis of one trial court and which imposed a “rigorous analysis” on the class certification decision.²⁴⁹ The rigor of the analysis should not prevent certification; rather, it should be used as a mechanism by which to further the appropriate mass tort class action in those contexts in which it can be most beneficial. One Sixth Circuit trial court has bucked the trend toward fearing the mass tort class action and expressed the belief that class actions are “the fairest, most efficient and economical means” to resolve mass torts,²⁵⁰ and accepted the challenge to analyze rigorously the class action. In *In re Telectronics Pacing Systems*,²⁵¹ the court expressed strong disagreement “with those Circuit Courts which have allowed their apparent economic biases to influence their interpretation of the requirements of Rule 23.”²⁵² The trial court proceeded to analyze Rule 23 in the context of litigation involving an allegedly defective pacemaker lead used by approximately 25,000 people and manufactured and marketed by a group of four related defendants.²⁵³

The over four hundred pending cases involving the defective lead had been consolidated for pretrial proceedings.²⁵⁴ After initially certifying the class, then decertifying the class after the decision in *In re American Medical Systems*,²⁵⁵ the plaintiffs filed a renewed motion for class certification on claims of medical moni-

²⁴⁷ *Id.* at 215-217.

²⁴⁸ See, e.g., *In re Beverly Hills Fire Litig.*, 695 F.2d 207 (6th Cir. 1982).

²⁴⁹ See, e.g., *Ilhardt v. A.O. Smith Corp.*, 168 F.R.D. 613 (S.D. Ohio 1996) (class certification denied for property damage from agricultural storage silos based on rigorous analysis of *In re American Medical Systems*, no common defect alleged in 34 different models of the silos, no one set of circumstances common as to defendant’s culpability.)

²⁵⁰ *In re Telectronics Pacing Sys. Inc.*, 172 F.R.D. 271, 275 (S.D. Ohio 1997).

²⁵¹ *Id.*

²⁵² *Id.* (citing *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) and *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995)).

²⁵³ *Id.* at 276-277. A fracture of the lead can cause serious injury to the heart if it fails—company documents suggest that 20% of the leads fail. The company has agreed to pay for screening and lead extraction. *Id.* at 277.

²⁵⁴ *Id.* at 277.

²⁵⁵ 75 F.3d 1069 (6th Cir. 1996).

toring, negligence, strict liability, and punitive damages.²⁵⁶ The earlier decertification order required that, for plaintiffs to succeed at any renewed certification efforts, they must demonstrate how the case can be managed as a class in light of the variations in state law.²⁵⁷ The plaintiffs proposed ten subclasses—some with sub-sub-classes—to handle state law variations.²⁵⁸ The named representatives for each sub-class were assured of adequately representing the class because each named representative shared the same home state with the sub-class so that the law applicable, and the nature of the harm suffered, would be identical, insuring protection of absent class members' interests.²⁵⁹

As to the Rule 23(b)(3)²⁶⁰ requirements, the court in evaluating predominance, focused on the common issues which seek to resolve "whether [the defendant] is legally responsible for the [product's defectiveness.]"²⁶¹ The court noted that there were only two products involved, both with the same alleged defect made by one group of defendants.²⁶² The court affirmed that "[w]here the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy."²⁶³ Regarding superiority, the court recognized the recent court of appeals decisions focusing on the state law variations that might render a class action unmanageable and thus inferior to individualized adjudication.²⁶⁴ The court disagreed with those courts who considered every detail and nuance of the negligence law of

²⁵⁶ *Telectronics*, 172 F.R.D. at 278.

²⁵⁷ *Id.* This requirement is consistent with the plaintiff having the burden of proof on appropriateness of certification.

²⁵⁸ *Id.* Plaintiff's subclasses are proposed based on whether jurisdictions permit state-of-the-art evidence to defend a products liability action, and based on the method of proving defectiveness under strict liability. *Id.* Plaintiffs did not seek certification of classes on fraud, warranty, or misrepresentation. *Id.* at 279.

²⁵⁹ *Id.* at 281. In this way, the concern for adequacy of representation expressed by many opponents of the class was alleviated and the protection of absent class members interests furthered. *Id.*

²⁶⁰ Plaintiffs also sought a Rule 23(b)(1) class for medical monitoring based on the limited fund and injunctive relief provisions of the rule. The court granted the certification of the medical monitoring class under each of Rule 23(b)'s subdivisions. *Id.* at 278-287.

²⁶¹ *Id.* at 289.

²⁶² *Id.* at 288.

²⁶³ *Id.* at 288 (quoting *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988)).

²⁶⁴ *Id.* at 290-294.

the different states to prevent class certification, and rejected the proposition that state law has to be universal before a class action is justified.²⁶⁵ Instead of rejecting subclasses on limited issues, the court accepted the opportunity to categorize and divide the subclasses based on the “important/meaningful/significant/pivotal” issues and to reject as important every minor nuance on which to hang the hat of decertification.²⁶⁶

In the Ninth Circuit, after the generally pro-mass tort class action *Valentino* decision, a federal district court in that circuit revisited the certification issue. In *Haley v. Medtronic, Inc.*,²⁶⁷ plaintiff sought class certification of claims arising out of defective pacemaker leads manufactured by the defendant. Approximately 43,000 of the defective leads are still in use and defendant, required by federal laws to obtain records of all users of the leads, can identify each person with a defective lead.²⁶⁸ The court found the common question of defendant’s liability for fraudulent misrepresentation of the safety of the leads predominated over individual issues, even though there were individual reliance issues that would exist in proving the fraud claim, as would have been the case in *Castano*.²⁶⁹ Nonetheless, the court concluded that the class action was not a superior method of adjudication, relying primarily on the unmanageability of the potential class.²⁷⁰

In contrast to *In re Telectronics Pacing Systems*, this case presents the classic example of the “mass” side of the equation and the fear of the task of managing a class action to dominate over the “tort” aspect of the problem. Here, the trial judge said that thousands of people who had alleged a fraud in the safety of their pacemakers and who had alleged emotional distress and fear over that potential malfunction, could not *en masse* obtain even a finding of the wrongfulness of that conduct because the damages sought were not yet great, due to the lack of personal

²⁶⁵ *Id.* at 291-293.

²⁶⁶ *Id.* at 292. The court also found the strict liability subclasses to be superior but denied certification on punitive damages because of the swiftly changing law of punitive damages nationwide. *Id.* at 294.

²⁶⁷ 169 F.R.D. 643 (C.D. Cal. 1996).

²⁶⁸ *Id.* at 648. The court found all aspects of Rule 23(a) satisfied by the class: numerosity, commonality, typicality, and adequacy of representation. *Id.* at 647-50.

²⁶⁹ *Id.* at 651.

²⁷⁰ *Id.* at 653.

injuries.²⁷¹ The trial court evaluated each of the elements of Rule 23(b)(3) to determine superiority and found there was no individual interest in the litigation of the claims and that the extent of other litigation concerning the controversy already commenced was not so significant as to weigh against certification; on the contrary, these two prongs weighed in favor of certification.²⁷² The court concluded that the plaintiff had shown no particular reason why the Central District of California was a desirable forum, and ultimately relied on the fourth factor—the difficulties likely to be encountered in the management of the class²⁷³—to base its denial of certification. The court relied on *In re Rhone-Poulenc Rorer* and the *Dalkon Shield* opinion from 1982, and not *Valentino*, to support its fears of “the particularly ‘unmanageable’ task of having to apply so many different state laws.”²⁷⁴ The court considered the wide variety of negligence rules, relied on in *In re Rhone-Poulenc Rorer*, to support its fear of the perceived, though not substantiated, variations in fraudulent misrepresentation laws at issue.²⁷⁵ This fear also prevented the court from certifying a limited issue class on liability, which individual plaintiffs could then rely on in subsequent litigation of the individual issues.²⁷⁶

With the state of the law in clear focus, this Article now responds to the criticisms leveled at the mass tort class action. It then defines the valid mass tort class action which the judiciary should embrace as an appropriate combination of the procedural purposes of the rule as well as the underlying tort responsibility goals.

IV

RESPONDING TO THE CRITICISMS—THE VALID MASS TORT CLASS ACTION DEFINED

Once all the dust settles from the recent flurry of class action

²⁷¹ *Id.* at 652 (damages each plaintiff suffered are of emotional import but not of high dollar amount, so no interest in individual litigation).

²⁷² *Id.*

²⁷³ *Id.* at 653-54.

²⁷⁴ *Id.* at 653 (relying on the hyperbole of *Rhone-Poulenc Rorer* on the differences in negligence law).

²⁷⁵ *Id.* at 653-54.

²⁷⁶ *Id.* at 656. The court subsequently suggests a more geographically limited class where the applicable laws will be the same. *Id.* One wonders what that limitation might mean, especially given the court's reliance on *Dalkon Shield*, which specifically denied class certification to only California plaintiffs.

decertifications, what will remain of the mass tort class action? There is a real danger that the criticisms leveled at the abuses in recent certification attempts will speak far more loudly than is necessary, particularly given the tendency of the decertification opinions to overstate the nature of the “crisis” to institutional defendants presented by the use of class actions.²⁷⁷ Indeed, the danger is being realized as evidenced by the lack of thoughtful certification analysis by most trial courts in the post-modern age of class actions.

There are three fundamental criticisms of the class action device that tend to cross all class action lines regardless of product type or factual history: (1) a lack of predominance of common issues given the variations in state tort law that inevitably are involved; (2) the lack of superiority of the device given the huge pressure for settlement that is impressed upon defendants, particularly in “immature” torts; and (3) the inability of the judicial system to manage the mass product injury class action as a combined result of the first and second criticisms, but even more because of the perception of destroyed judicial integrity resulting from the move away from our traditional method of adjudication. This Article addresses those criticisms in turn.

A. *Settlement and Liability Classes Distinguished: Amchem Products and Castano*

As an initial matter in responding to criticisms of mass tort class, this Article does not address those criticisms unique to settlement classes. The problem of collusive settlements, plaintiffs lawyers hand-picked by defendants to effect a settlement, plaintiffs lawyers who do not interact with their clients in any meaningful way, nonjusticiability of claims of injury that have not yet manifested themselves, and others have been identified and addressed recently by the Supreme Court in *Amchem Products*.²⁷⁸

²⁷⁷ One author has described a rhetoric of crisis in the mass tort context, particularly as it applies to the settlement class. See John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990 (1995) (suggesting that crisis rhetoric impairs ability to solve mass tort resolution problems).

²⁷⁸ *Amchem Prods. Inc. v. Windsor*, 117 S. Ct. 2231 (1997). For a discussion of the *Amchem Products* decision, see *supra* notes 138-147 and accompanying text. A number of additional problems are raised by the settlement class which seeks to resolve all future injury claims including a significant problem of Article III justiciability. See *Arizona Dept. of Corrections v. Casey*, 64 U.S.L.W. 4587 (U.S. June 24, 1996) (discussing actual injury requirement of Article III). See generally Note, *And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers*, 109

The primary settlement class fears of collusive settlement combined with the fear of inadequate representation of absent class members whose injuries likely are not fully realized are unique to the settlement class and have been explored in great detail in other venues.²⁷⁹ Though many judges consider all class actions merely the precursor to a coerced settlement as a result of the size of the class and the potential liability at stake, this is a different problem from that presented in actual settlement classes which come to the court in one package—certification and settlement in one.

The *Castano* class was, at the time, not near a settlement (though in all fairness to the defendants, the plaintiffs representatives must have anticipated that a settlement would be produced because of the huge number of claimants coupled with potential liability). Given the historical contentiousness of the tobacco litigation,²⁸⁰ collusive settlements and inadequate representation of absent plaintiffs, as in the asbestos settlement class context, were not likely to be a concern. Similarly, in *In re Rhone-Poulenc Rorer*, the court was concerned that the size of the class and the potential liability would lead defendants to settle because of the high stakes of a liability determination. The presence of, or potential for, a collusive settlement, reached between plaintiffs and defendants lawyers to produce high fees and low claim values in return for a speedy final resolution (as was purportedly presented in *Amchem Products*), was not part of the court's concern.

HARV. L. REV. 1066 (1996) (judiciary is proper place for handling future injury claims). Reasonable notice to all class members is a chronic problem in such cases as well. The Supreme Court identified notice as a likely insuperable obstacle in the *Amchem Products* class. *Amchem Prods. Inc.*, 117 S. Ct. at 2252. *But see* 117 S. Ct. at 2257 (Breyer, J. dissenting in part) (criticizing majority's observation on notice, trial judge is proper reviewer of notice as an initial matter). *See also* Darren Carter, Note, *Notice and the Protection of Class Members' Interests*, 69 S. CAL. L. REV. 1121 (1996).

²⁷⁹ *See supra* notes 142-146 and accompanying text. On settlement class problems generally, see Symposium, *supra* note 4; Coffee, *supra* note 4. On the general concern of the ethical representation by plaintiffs lawyers see Heidi Li. Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885 (1996); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982) (exploring individual litigant protection issues in institutional reform class actions); *see also* Stephen J. Safranek, *Do Class Action Plaintiffs Lose Their Constitutional Rights?*, 1996 WIS. L. REV. 263.

²⁸⁰ *See* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992).

B. Predominance and Variations in State Law

Choice of law problems are complex but not insuperable. There are only three major choice of law theories.²⁸¹ In tort cases, the traditional place of the injury rule for identifying the applicable law has given way in by far the majority of jurisdictions to a test focusing on the state that has the most significant relationship to the issues and the occurrence.²⁸² The choice of law in mass product liability cases has proved problematic because of the nature of the product manufacturer/consumer relationship and the mass marketing and distribution of the modern age.²⁸³ Some have advocated federalizing choice of law,²⁸⁴ and others advocate the current state-by-state approach.²⁸⁵ Under the *Erie* doctrine, federal courts sitting in diversity must apply the choice of law rules of the jurisdiction where they sit²⁸⁶ and so the choice of law decision in federal court does indeed require an extensive analysis under *Erie* of the choice of law rules of the relevant jurisdiction. Further, the Supreme Court has held that the federal Constitution's Due Process Clause prohibits a forum from applying its own law to members of a class action who have no significant contact or aggregation of contacts with the forum, even though the forum has a judicial efficiency interest in applying its own law to a properly constituted class action proceeding

²⁸¹ The prominent choice of law theories in this country are the Most Significant Relationship test of the Restatement (Second) of Conflicts, the traditional *lex loci* approach and governmental interest analysis. See ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* (2d ed. 1990). By far the majority of jurisdictions apply the *Restatement (Second)* test in tort cases. See Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. COMP. L. 447, 459 (1997). On choice of law theories generally in tort cases, see WILLIAM M. RICHMAN AND WILLIAM A. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* § 84 (2d ed. 1993).

²⁸² This is the test reflected in the Restatement (Second) of Conflicts, and is found in sections 145 and 146 regarding tort choice of law rules. *RESTATEMENT (SECOND) OF CONFLICTS*, §§ 145, 146 (1971).

²⁸³ For a discussion of choice of law approaches to products liability class actions, see Steven P. Zabel and Jeffrey A. Eyres, *Conflict-of-Law Issues in Multistate Product Liability Class Actions*, 19 HAMLINE L. REV. 429 (1996) (taking a pro-defendant approach to choice of law strategy).

²⁸⁴ See, e.g., Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623 (1992) (encouraging use of federal common law-making power for choice of law principles in mass tort cases).

²⁸⁵ See, e.g., Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547 (1996) (advocating retaining current choice of law analysis for complex litigation).

²⁸⁶ *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941).

and even though the plaintiffs chose not to opt out of the class.²⁸⁷ Certainly, choice of law issues are complex. Complexity, however, does not require capitulation to the individualized litigation status quo.

It is not clear that in a mass tort class action the choice of law rules of the jurisdiction in which the court is sitting would mandate that the laws of all the fifty states apply even if the plaintiffs are from those fifty states.²⁸⁸ Most jurisdictions would permit an evaluation of the laws of other jurisdictions, and indeed require it, before concluding that only one law was applicable.²⁸⁹ However, requiring an analysis of relevant and interested jurisdictions does not mandate the application of the law of each state. A thoughtful, reasoned analysis of a class action involving claimants from all states could legitimately result in applying the law of the defendants' home state to determine liability for conduct-based claims such as fraudulent misrepresentation or negligence. Further, even if the law of all states where plaintiffs reside is a particular jurisdiction's clear choice of law in spite of proper manageability considerations in the choice of law decision-making process, the variations in state law are unlikely to have a meaningful affect on the litigation of the claims.

While those who oppose class certification speak at length about the variations in the applicable law of products liability, these variations are unlikely to substantially impact the determination of the defendants' responsibility. This concern is based on the individual litigation model of adjudication in which defendants play upon the nuances in jury instructions and apply those to the specific facts to accomplish a jury finding of no liability. Such tactics have been going on for centuries and will continue in the context of the individualized lawsuit. In the context of the mass tort, however, the basic premise of one-on-one harm is not pres-

²⁸⁷ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) (holding that a state court in a state law based class action cannot simply apply its own law to all claims within the class not having a contact with that state even to promote judicial economy in the context of the class action). *See also* *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (before a forum state may apply its own law to a claim it must have a significant contact or aggregation of contacts with the claim so as not to offend fundamental fairness and substantial justice).

²⁸⁸ *See, e.g., In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988) (applying law of state of product manufacture to class claims as more significant than state of individual plaintiffs).

²⁸⁹ *Continental Casualty Co. v. Fibreboard Corp.*, 762 F. Supp. 1368 (N.D. Cal. 1991), *aff'd*, 953 F.2d 1386 (9th Cir. 1992).

ent. In both *In re Rhone-Poulenc Rorer* and *Castano*, the classes were certified as to liability only and the discussion of individual variations in state law swamping the common issues arguably served only as a smokescreen. There may indeed be individual issues of causation and damages ultimately, but in a class certified as to liability the perceived individualized claimant-specific issues should not be used to conclude that the legal rules as to defendants' liability must also remain individualized. Just as the plaintiffs in *In re Telectronics Pacing Systems* were able to categorize the liability laws of all fifty states into about ten subclasses,²⁹⁰ so too the laws on causation, as to which there are only two basic mechanisms of proof,²⁹¹ and comparative fault principles, as to which there are only a few different methods,²⁹² are not remarkably dissimilar.

And even if it is appropriate not to determine causation and comparative fault in some aggregate method, such a conclusion does not equate to a lack of predominance of the common liability issue which crosses all plaintiffs cases and which does not change depending on the location of the plaintiff. Indeed, the conduct that leads to a finding of liability in mass product liability cases occurs, if at all, at the point in time that the product left the defendants' control in a defective condition, either in design, warning, or manufacturing. The one thing that is common in all product liability cases is that the identity of the plaintiff or the place where the injury actually occurs is usually irrelevant to whether the defendant engaged in tortious activity.²⁹³ In fact, in a recent explanation of choice of law decisions in mass tort cases, it was revealed that most courts conclude that the same law applied under all relevant choice of law approaches.²⁹⁴ Therefore,

²⁹⁰ See *supra* note 158 and accompanying text.

²⁹¹ See generally JAMES A. HENDERSON ET AL., *THE TORTS PROCESS* 111-24 (4th ed. 1994) (discussing two major variations in the fact-based causation analysis).

²⁹² See *id.* at 472-74, 479 (discussing the basic variations in calculating plaintiff fault). Most jurisdictions have adopted some variation of the Uniform Comparative Fault Act, 12 U.L.A. 43 (1992 Supp.).

²⁹³ Indeed, in the recent American Law Institute project on complex litigation, the primary recommendation was that the law of the place where the conduct causing injury occurred should govern when there was no other common jurisdiction between the parties. See AMERICAN LAW INSTITUTE, *COMPLEX LITIGATION PROJECT* § 6.01(d)(4) (1994).

²⁹⁴ Kramer, *supra* note 285, at 553-54. See also Patrick A. Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 140 (1994) (judges wish to apply a single law to all claims and parties in mass torts).

the concern that the variations in state law will swamp common issues is vastly overstated.

Even if it were not likely that most choice of law theories would end up in the same result, the actual variations in state law on any particular tort liability issue are not at all likely to cause a problem in instructing a jury for most able trial judges. After all, in negligence, you either have a duty or you do not. You either have a breach or you do not. What it takes to breach a duty of reasonable care is not likely to vary significantly, as the standard is not a legal issue but a factual issue. Any variations in how particular jurisdictions phrase the inquiry are likely to be semantic. There are, after all, only so many ways to describe the reasonable, prudent person.

As to the variations in the law of fraud and misrepresentation presented in *Castano*, fraud has several elements but they are a finite list,²⁹⁵ and for those jurisdictions that only require some of the list, it would not be difficult to define a jury instruction to accommodate all possible combinations. Once the legal definition contains all variations, the jury can decide whether the fact of each element has been proved. The entire issue of reliance was overstated in *Castano*; the district court ultimately did not certify reliance as an issue because it could be specific to each individual plaintiff if a presumption of reliance was not found available.²⁹⁶ Reliance in fraud cases acts as the causation element—if the plaintiff was not affected by the misrepresentation then it could not have caused any harm. Causation is often one of the issues in limited issue classes that is withheld from the class issues because it is individual and not common. This is what happened in the first class action certified in *Jenkins*.²⁹⁷

In limited issue classes on liability, the concern for individualized issues swamping the common ones is a misplaced concern; there are likely to be only a handful of legitimate (not fabricated to defeat class certification) liability variations and only a hand-

²⁹⁵ See DAVID G. OWEN ET AL. *PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS* 77 (3d ed. 1996). On fraud and deceit in products liability generally, see Marshal A. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

²⁹⁶ On the unnecessary fear of the reliance issue as it affects class certification, see *Haley v. Medtronic, Inc.*, 169 F.R.D. 650 (C.D. Cal. 1996) (finding that individual fraud issues of reliance did not destroy predominance of common questions). For a discussion of *Haley*, see *supra* notes 267 and accompanying text.

²⁹⁷ See *supra* notes 80-83 and accompanying text.

ful of relevant jurisdictions because of the limited number of defendants involved. Other than the asbestos cases, most class actions have less than ten defendants. *Castano* involved seven tobacco manufacturers; *In re Rhone-Poulenc Rorer* involved four defendant blood product fractionators; the silicone gel breast implant litigation involves approximately eight defendants; the Norplant contraceptive and pacemaker leads litigation involved one defendant each.

Limited issue classes on liability as against such a small number of potentially culpable defendants can hardly be said to involve so many variations of state law on liability as to defeat predominance when the focus is placed properly on the issue of liability in its duty and breach component and not on the causation and defenses issues. Consequently, a well-defined, discrete number of defendants is an important characteristic of the mass tort class action as a response to the concern over variations in state law.

C. *Superiority and Protecting Defendants from the Pressure to Settle*

After *In re Rhone-Poulenc Rorer* and *Castano*, superiority analysis under Rule 23(b)(3) is synonymous with settlement pressure. If there is undue pressure to settle, the class action is by definition not superior regardless of other factors weighing in its favor. As expressed in both cases, the pressure to settle is a function of the large number of claims and the perceived likelihood that the sheer number of claimants will result in a jury finding of liability where none otherwise exists and that settlement is likely to occur because of the spectre of that liability. As mentioned earlier, such a concern, while a legitimate concern for the defendants as they prepare the case and evaluate their strategy for the trial, is no part of the superiority analysis which requires a comparison of the class action with alternatives for adjudication of that case as constituted.²⁹⁸ There is no suggestion that the defendants' financial stake upon losing the case should be part of

²⁹⁸ Indeed, recent data suggests that certification and settlement do not by any means go hand in hand, and that, if settlement occurs, it is more likely to be the result of "judicial recognition of the plausibility of the claims and the multiplication of those claims by the size of the class. In other words, the impetus to discuss settlement flows from a realistic assessment of the liability the litigation might be expected to impose." Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 145 (1996).

the analysis any more than the plaintiffs' financial stake if *they* lose. The implicit pressure to settle in the liability class is assumedly based on the defendants' perceived high risk of a finding of liability either because of a combination of a high likelihood of a finding of liability coupled with the desire to save costs of litigation as well as high judgments, or as a result of the presence of very damaging, even embarrassing, information supporting culpability, as in the asbestos and silicone gel breast implant cases. Either circumstance *supports* class certification because of the substantive tort goals of deterring irresponsible conduct and the greater likelihood that a collective action will accomplish that because of the increased resources and power that accrue to plaintiffs when their efforts combine.²⁹⁹

Further, class action certification has always been engaged in without a view to the merits,³⁰⁰ preventing judges from re-writing the pleadings to create a circumstance that somehow comports with the judge's idea of how the case should proceed, either toward or away from certification. The *In re Rhone-Poulenc Rorer* and *Castano* courts are subject to criticism on this very point because those opinions reek of contempt for the substance of the claims pressed by the plaintiffs. Judges of the last several decades have been criticized for this kind of judicial activism when it came to "helping" plaintiffs by expanding rules of products liability.³⁰¹ The same criticism is appropriately leveled at decisions

²⁹⁹ See Rosenberg, *supra* note 10, at 573. Professor Rosenberg advances the mass tort class action because of its potential to contribute to a "public law" vision to obtain greater accident avoidance. He states:

By making relatively low value claims marketable to competent plaintiff attorneys, class actions bolster the deterrent effect of threatened tort liability. Absent class action treatment, the bulk of these claims would be excluded from the system, reducing both the firm's incentives to take precautions and its internalization of residual accident costs. The potential for administrative cost savings is very high as well. Mandatory class actions would radically reduce the consumption of party and public resources for redundant, case-by-case adjudication. It would also substantially diminish the cost advantage conferred on defendant firms by the private law, disaggregative process—which in reality is disaggregative only on the plaintiff side.

Id. at 573. But see Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579 (1994).

³⁰⁰ See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (merits of case not relevant to class certification).

³⁰¹ See Philip Shuchman, *It Isn't That the Tort Lawyers are so Right, it's Just that the Tort Reformers Are So Wrong*, 49 RUTGERS L. REV. 485 (1997) (chronicling the perceived "explosion" of pro-plaintiff tort rules and judges and the "tort reformer"

that recognize immunity-like rules which favor institutional defendants as a whole because of a hidden distaste for the nature of the plaintiffs' claims. The concern for defendants being pressured into settlement masks this underlying dislike for the merits. Hence, the *Castano* court's label of the fraud claims against the tobacco industry as "immature" or "novel" and the *In re Rhone-Poulenc Rorer* court's description of the many defense victories and a lone plaintiff's success.

The concern for the maturity of the claims, addressed above in specific relation to *Castano*,³⁰² must also not be overstated. As to certain factually immature issues, like speculative general causation, some cases will require a "maturing of judgment"³⁰³ but to suggest that class action treatment will never be appropriate unless there have been some individual trials, possibly many, flies in the face of the purpose behind the Rule. It is not true in securities litigation, consumer fraud, employment discrimination, or other types of cases that support class action treatment that individual trials are needed to determine whether the course of conduct in question is or is not a breach of a legal duty. There is no reason to distinguish these cases from mass tort class actions except for the money at stake. It turns judicial integrity on its head to suggest that the greater and more widespread the harm caused the greater protections we provide to the institutional defendant and the harder we make it for individuals to have their day in court.

There are very real pressures to settle cases of the magnitude of mass tort class actions. But as one manufacturer's representative recently opined, "Good Lord! . . . Who wants to try these cases individually for the next 30 years?"³⁰⁴ It is precisely because the harm caused is so widespread and because it comes from a common course of defendant conduct that the defendants should not be entitled to rely on the individualized adjudication model that provides the greatest likelihood of successfully de-

response in the 1980s and 1990s). See also Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683 (1992) (discussing the procedural side of the judicial activism debate and defining the category of complex litigation which appropriately should be distinguished from the individualized adjudication model).

³⁰² See *supra* note 210 and accompanying text.

³⁰³ *Rhone-Poulenc Rorer*, 51 F.3d at 1300.

³⁰⁴ Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST. J., July 18, 1996, at A1. This quote came after the *Georgine* settlement was decertified.

fending these claims. The pressure to settle and the concern for a large number of unmeritorious claims comes from the fact that with widespread tortiously caused harm there are also a large number of meritorious claims. Fairness to the parties is of paramount concern in the class action certification decision but it must be remembered that *both* sides of the actions have parties who have an interest in fairness in the litigation process. The bold defendant favoritism does little to encourage the public to believe in the fair dispensation of justice.

D. Manageability and Judicial Integrity

The above responses to the criticisms of mass tort class actions are also apropos of the concern for manageability and judicial integrity.³⁰⁵ It seems that, at bottom, the manageability concern is one not for the administrative ease of the bench, but for continuing the perception of confidence and control by the judiciary in its task.

There are a number of components of what we call "judicial integrity." Among them are such things as preventing and punishing perjury,³⁰⁶ disciplining unethical judges and lawyers,³⁰⁷ providing mechanisms to correct judicial mistakes,³⁰⁸ meaning-

³⁰⁵ The concern for integrity of the judicial system is clearly expressed in *Georgine* where the court said "against the need for effective resolution of the asbestos crisis, we must balance the integrity of the judicial system." *Georgine*, 83 F.3d at 610, 617. Integrity is defined as "firm adherence to a code of [especial] moral or artistic values," "incorruptibility." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 628 (1988). And Black's Law Dictionary says "it is synonymous with 'probity,' 'honesty,' and 'uprightness.'" BLACK'S LAW DICTIONARY 726 (5th ed. 1979).

³⁰⁶ See Richard H. Underwood, *Perjury: An Anthology*, 13 ARIZ. J. INT. & COMP. L. 307 (1996) (discussing history of actions for perjury).

³⁰⁷ See, e.g., *Liteky v. United States*, 510 U.S. 540, 564 (1994) (discussing standard of review for disqualification of trial judges for bias):

When the prevailing standard of conduct imposed by the law for many of society's enterprises is reasonableness, it seems most inappropriate to say that a judge is subject to disqualification only if concerns about his or her predisposed state of mind, or other improper connections to the case, make a fair hearing impossible. That is too lenient a test when the integrity of the judicial system is at stake. Disputes arousing deep passions often come to the courtroom, and justice may appear imperfect to parties and their supporters disappointed by the outcome. This we cannot change. We can, however, enforce society's legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality.

On the ethical obligations of lawyers generally, see MODEL RULES OF PROFESSIONAL CONDUCT (1992).

³⁰⁸ It is a truism that the appeals process is intended, in part, to allow for review of

fully involving the public in the system through impartial jury selection,³⁰⁹ and maintaining a proper balance with the executive and the legislative branches to insure impartiality and independence of the judiciary.³¹⁰ The fundamental principle of stare decisis forms an important element of the integrity of the judiciary, though its unsupported application is as much a violation of judicial integrity as is the unprincipled rejection of precedent.³¹¹ All of these elements lead inevitably to promoting public confidence in the ability of the legal system to administer fairly and evenhandedly the application of our laws. The decertification of mass tort class actions will promote judicial integrity only if the very Rules which are intended to effectuate the integrity of the judiciary are followed as impartially as intended. The favoritism displayed in the recent limited issue class certifications discussed does not accomplish the goal.

The concern for unmeritorious claims is legitimate; the method for addressing it, however, is not a rejection of meritorious claims, but a separation of the wheat from the chaff as the process progresses. Limited issue classes take into account the likelihood of unmeritorious claims by dealing only with the culpability determination of the alleged tortfeasors.

V

FAIRNESS AND INTEGRITY IN MASS TORT CLASS ACTIONS

Hundreds of thousands of people get hurt everyday; medical injuries, automobile accidents, fires, and the like occur daily. But

the decisions, legal and procedural, of trial courts to ensure accuracy and to promote the neutrality of the process. *See generally* Karl N. Llewellyn, *THE COMMON LAW TRADITION: DECIDING APPEALS* 4 (1960) (discussion of factors which influence appellate opinions).

³⁰⁹ *See* *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (on the unconstitutional use of race- and gender-based discriminatory jury strikes to exclude persons from jury service).

³¹⁰ *Mistretta v. United States*, 488 U.S. 361 (1989) (examining whether statute requiring participation of Article III judges in the United States Sentencing Commission threatened the integrity of the Judicial Branch based on separation of powers principles).

³¹¹ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (principle of stare decisis adds to actual and perceived integrity of judicial system by insuring evenhanded consistent application of legal principles). For a jurisprudential exploration of the interplay between stare decisis and integrity, see Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 *YALE L.J.* 2031 (1996) (discussing Ronald Dworkin's theory of judicial integrity).

no one would suggest that these cases should be aggregated for resolution even though they involve very similar conduct over the course of time. They, of course, do not involve the same conduct of the same people. Product related mass harms, on the other hand, do. No segment of our society poses the same kinds of undifferentiated, indiscriminate risk that product manufacturers who mass market their products world- and nation-wide do. Tort responsibility rules are struggling to accommodate both the interests that the institutional product defendants have in engaging in such socially useful and financially rewarding conduct, and the interests members of society have in being able to obtain socially useful products through responsible marketing and promotional methods that do not have unreasonable injury causing defects. When the manufacturer of those many thousands of products is asked to defend its conduct in the design/manufacture/distribution/promotion of that product, what goals support continuing to insist on defending that product one claim at a time? Why should all those injured persons in the queue of injury claims be made to wait, and wait, and wait until the defendants' or their own resources dry up, especially when everyone in the litigation line ahead of them is doing the same exact thing—proving culpability—the thing that is taking years to complete? It simply flies in the face of the principle of efficient, fair, and timely justice.³¹²

How does the tort system affect deterrence of irresponsible behavior? It requires the tortfeasor to pay for the harm caused. There has not as yet been devised a compensation scheme which can accomplish the compensation of tortiously caused harms outside of the judicial system.³¹³ Our judicial system places the label "tortfeasor" on an entity only after a judicial finding, and that judicial finding occurs dominantly in the context of the one-to-one adjudication system. If that system does not function in a way that permits injured persons to prove, timely and fairly, whether tortious conduct has occurred, the judicial system loses

³¹² Other commentators, though not many, have agreed with the proposition that the mass tort class action is one of the few ways to promote the efficient resolution of claims. See, e.g., Heather M. Johnson, Note, *Resolution of Mass Product Liability Litigation within the Federal Rules: A Case for the Increased Use of Rule 23(b)(3) Class Actions*, 64 *FORDHAM L. REV.* 2329 (1996).

³¹³ Many limited issue compensation systems have been used, among them the federal blank lung system and the childhood vaccination compensation systems. For a discussion of the bleak future prospects for compensation systems, see Symposium, *Future Prospects for Compensation Systems*, 52 *MD. L. REV.* 893 (1993).

the public's confidence in its ability to do its job. Further, compounding that loss of judicial integrity in the mass tort context is the reality that the greater the alleged tortious conduct, the more likely there will never be a determination of responsibility because of the nature of the individualized litigation model. The judicial system cannot keep up with its obligation to assess responsibility under society's tort rules unless it balances the magnitude of the harm caused by allegedly irresponsible conduct with the institutional defendant's right to defend the imposition of that responsibility.

To accommodate both the plaintiffs' and the defendants' interest in fair treatment, the mass tort class action can be properly used when the distribution of the product has occurred over a sufficiently limited period of time to enable a realistic assessment of the defendants' conduct. The marketing of the pacemaker leads in *In re Teletronics Pacing Systems*³¹⁴ and *Haley*³¹⁵ are perfect examples of a sufficiently limited time span of product marketing so that the proof of liability will not be unwieldy and difficult to obtain. Changes in courses of conduct over time, as in the asbestos cases, cause difficult proof problems. Further, the number of claimants should *not* be a determinant; rather, the number of defendants whose culpability must be determined should be kept to a logically connected group. If a group of defendants marketed a product or similar products, there is no reason to limit the class just because they have caused harm to 75,000 claimants, as opposed to 75 or 7500 claimants. It would be appropriate, however, to require that the group of defendants have some institutional connection or some industry group connection so that the evaluation of responsibility among them is not compounded by their number. For example, a class against ten manufacturers of a similar product would arguably lead to confusion about the actual nature of the tortious conduct of each, unless there was a connection through industry associations or joint marketing efforts or shared product information. The tobacco classes against the industry as a whole, might be inappropriate for this reason. Nonetheless, the classes against one defendant alone obviously do not suffer from this problem.

Early class action certifications in mass torts extolled the vir-

³¹⁴ 172 F.R.D. 271 (S.D. Ohio 1997).

³¹⁵ 169 F.R.D. 643 (C.D. Cal. 1996).

tues of the limited issue class.³¹⁶ While *In re Rhone-Poulenc Rorer*³¹⁷ and *Castano*³¹⁸ rejected such liability-only classes, those cases are in many respects alone in that conclusion. The Judicial Conference currently revising Rule 23 is trying to increase the emphasis on limited issue classes by making them more easy to certify in mass tort cases under Rule 23(c)(4).³¹⁹

The overbroad language of recent decertifications has added to the perception that class actions are wholly inappropriate for mass torts in spite of the availability of the limited issue class. In recent decertifications, the lower courts have been persuaded by the references to immature torts in the court of appeals opinions and the concern for the pressure to settle.³²⁰ Immaturity is not a significant issue in the majority of mass torts because the conduct to which liability attaches has occurred over the preceding decades and there is information, hopefully to be obtained in discovery, to support that liability. If there is not, plaintiffs will lose. If prior cases have been filed through which discovery of damaging, liability supporting information has been obtained, then the cases are not immature, by definition. Time usually only reveals more and more information supporting liability—the asbestos and Dalkon Shield litigation are perfect examples of how increasingly damaging information on liability is disclosed as time passes and more determined plaintiffs' lawyers get involved.³²¹ And of course, there are circumstances when early indications of

³¹⁶ See *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 470 (5th Cir. 1986) (limited issue class as to state of the art defense in asbestos litigation); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196-97 (6th Cir. 1988) (environmental contamination class; "[W]here the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy.")

³¹⁷ 51 F.3d 1293 (7th Cir. 1995).

³¹⁸ 84 F.3d 734 (5th Cir. 1996).

³¹⁹ Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 25-26 (1996) (Advisory Committee intends to emphasize issue classes); see also Robert G. Bone, *Rule 23: Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79 (1994) (discussing revisions to Rule 23); William W. Schwarzer, *Structuring Multiclaime Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250 (1996).

³²⁰ See, e.g., *In re Norplant Contraceptive Prods. Liab. Litig.*, 168 F.R.D. 577 (E.D. Tex. 1996) (decertifying based on *Castano* concern for immaturity). For a discussion of additional trial court decisions post-*Castano*, see *supra* notes 228-242 and accompanying text.

³²¹ For a discussion of this history of the asbestos litigation, see PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985). On the Dalkon Shield litigation, see RONALD J. BACIGAL, *THE LIMITS OF LITIGATION: THE*

tortiously caused harm are not ultimately revealed, and Bendectin serves as an example.³²² But in the least, liability evidence is fairly stable over time because the evaluation of responsibility is retrospective. Most of such responsibility-supporting information is in the control of the defendant. Maturity does not usually aid an institutional product defendants case on liability.

In addition, limited issue classes do not suffer from the manageability/judicial integrity problems inherent in class actions certified as a whole. There are no damages or causation subclasses to create to accommodate the remainder of the issues to be resolved before liability ultimately attaches. Conduct giving rise to liability by definition precedes injury. It follows, then, that once injury results, liability can be evaluated prior to the causation issue. Issues of misuse, proximate cause, and the like do not have to be evaluated to determine whether a product is defective, or whether the manufacturer's conduct is negligent. The marketing scheme of all products in the late Twentieth Century is consumer non-specific. It only makes sense that the determination of responsibility be consistent with that scheme. In fact, strict liability, in place in the vast majority of American jurisdictions, was heralded as a way to focus on the product, not the manufacturer's conduct, because that is where liability lies. It is precisely because a product's relationship to a user or consumer is so generic that mass tort class actions on liability can fairly and efficiently be conducted.

CONCLUSION

This Article has provided a history of the mass tort class action and its recent treatment by several important court of appeals decisions to explore a method of advancing, rather than limiting, the use of the mass tort class action. Three primary criticisms of mass tort class actions—lack of predominance because of state law variations, lack of superiority largely because of pressure on defendants to settle in immature torts, and the lack of manageability because of judicial integrity concerns—have been identified and addressed. The first two criticisms appear to be substantively based, and yet they do not deal directly with the real pur-

DALKON SHIELD CONTROVERSY (1990) and MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* (1985).

³²² See MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS* (1996). The Bendectin cases also involved speculative proof of general causation.

pose of the actions presented, to provide a judicial determination of responsibility for harm caused, to deter future conduct, and to correct the resulting imbalance between institutional defendant and consumer. The third criticism often is the one that holds judicial attention as a reason for decertifying a class so that the goals of the class action procedure and how they can appropriately fit mass tort litigation are often ignored.

It does not make sense to reject the class action in mass torts because the number of victims is so large and the harm so great. This is precisely why the class action is appropriate—one culpability determination would greatly increase the efficiency of the court system while recognizing the reality of the product marketplace. Why should a defendant or group of defendants be entitled to thousands of chances to convince thousands of jurors that one identical set of facts does *not* give rise to liability? That is what happened in the asbestos litigation that consensus says has been a dismal failure of judicial efficiency and fairness to litigants. Even though our judicial system is built on individualized adjudication, it does not also have to stand for the proposition that the greater the harm, the more difficult it is to obtain redress. By failing to recognize the value of class actions for mass torts, we are letting the judicial system destroy the chance of many victims of mass harms to obtain redress in a meaningful fashion. Judicial integrity is a valuable asset only if it is achieved not for the sake exclusively of the judiciary as an institution, but also, and most importantly, for the sake of the timely and meaningful vindication of rights and the enforcement of responsibilities. The fact that the class action procedure requires compromises is an insufficient reason to fear and thus reject it.

In the course of studying class action cases, this Article has chronicled an alarming reluctance by both jurists and academics to promote the use of the class action as an appropriate form of justice for the resolution of mass tort cases. There is a workable, beneficial fit of process with problem. The documented reluctance is partially the result of the mindset of the thinker—the historic dedication to the individualized justice model serves as the exclusive model for most jurists and proceduralists. Consequently, no other model will serve the “goals” established because no other model realistically exists.

This Article encourages the legal academy, jurists as well as academicians, to consider the possibility that a tort-based foun-

dational reference exists upon which to construct a model of appropriate class action use. The reality is that culpability in mass product liability cases is not an isolated event capable of resolution in isolation from the world of common harms. For the judicial system to maintain its integrity, use of the mass tort class action in its limited issue format will serve the goal of resolving costly and protracted litigation while focusing on the institutional defendants' harm to the community by marketing products/substances that have done collective harm. Class actions are a way for the judicial system to keep, not lose, its integrity.